United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

77-1045

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1045

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS CIRILLO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
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ANTHONY PUSATERI, CLERK
SECOND CIRCUIT

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NOTICE OF MOTION TO VACATE SENTENCE

A 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LOUIS CIRILLO,

Defendant.

----------x

Indictment #72 CR. 309

NOTICE OF MOTION TO VACATE SENTENCE

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of JOHN NICHOLAS IANNUZZI, duly sworn to the 22 day of November, 1976, and upon the Exhibits A through E attached to the said affidavit, as part of this Motion, and upon the indictment and upon all pleadings and proceedings heretofore had herein, the undersigned will move before the Honorable Edward Weinfeld, the Judge before whom all matters in this case have previously been heard, at the Federal Courthouse, Foley Square, County and State of New York, on the ~~23rd~~ 30th day of November, 1976 at 2:15 P.M. of that day, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 35 of the Federal Rules of Criminal Procedure and 28 U.S.C. 2255 vacating the sentence heretofore imposed upon the Petitioner-Defendant on May 25,

1976 on the grounds that the total and purposeful failure, refusal and neglect of the United States Attorney to comply with 21 U.S.C. 851 resulted in an illegal sentence being imposed upon the Petitioner-Defendant; or in the alternative, for an order setting down for a date certain a hearing to determine the above said, together with such other and further relief as to this court may seem just and proper.

Dated: New York, New York
November 22, 1976

Respectfully submitted,

IANNUZZI & IANNUZZI
Attorneys for Petitioner-
Defendant
233 Broadway
New York, New York 10007

TO: ROBERT M. FISKE, JR.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-v-

LOUIS CIRILLO,

Defendant.

----------x

JOHN NICHOLAS IANNUZZI, being duly sworn, deposes and says:

I am one of the attorneys for Louis Cirillo, the Petitioner-Defendant herein, and make this affidavit in support of the instant application to vacate an enhanced sentence of 25 years incarceration heretofore imposed by this Court upon the Petitioner as a Second Offender on the 25th day of May, 1972 subsequent to Petitioner's conviction after trial of the crimes of Possession of a Narcotic Substance with Intent to Distribute and a Conspiracy so to do.

This application is made pursuant to Rule 35 of the Federal Rules of Criminal Procedure and 28 U.S.C. 2255.

The basis of Petitioner's application is that, as detailed fully hereinafter, the United States Attorney totally failed and neglected to timely file a Second Offender Information against Petitioner herein as strictly required by 21 USC 851 before this Court would have been

empowered to impose an enhanced sentence upon Petitioner.

Moreover, it is respectfully and regretfully suggested, a careful scrutiny of the available official records and documents on file in the Clerk's office of this Court lead to the inescapable conclusion that, at the time of sentence, the United States Attorney was aware of the strict requirements for the timely filing of a Second Offender Information; that the United States Attorney was further aware that such timely filing had not taken place herein; and, that the United States Attorney purposely and intentionally mis-advised this Court that the said filing had been timely made, purposely and intentionally misleading this Court to impose an impermissibly enhanced sentence upon the Petitioner.

Section 851 of Title 21, U.S.C. specifically mandates, inter alia, that, in order for a person to be charged with and thereafter receive an enhanced sentence as a second felony offender of the Narcotics Laws of the United States, an Information specifically charging the prior felony narcotics conviction be filed on or before the start of trial on the subsequent felony charges. The pertinent statute reads, in part, as follows:

> "851. (a) (1) No person who stands convicted of an offense under this part shall be sentenced

> to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States Attorney files an information with the Court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.***"

The trial which resulted in the instant conviction of the Petitioner commenced with jury selection on the 17th day of April, 1972. Jury selection was completed on the same date. Thereafter the taking of evidence ensued and the trial was continued on April 18, 1972; April 19, 1972; April 20, 1972; April 21, 1972; April 24, 1972; and was concluded by a jury verdict of guilt on April 25, 1972. Sentencing was scheduled for and actually pronounced on May 25, 1972.

At the time of the said sentencing, the United States Attorney, Whitney North Seymour, Jr., erroneously and, again, solely from an analysis of the available official documentation, knowingly mis-advised this Court that the Second Offender Information had been properly and timely filed on April 12, 1972, a date prior to commencement of trial. The United States Attorney further advised this Court at that sentencing that although the Second Offender Information had been timely filed, the Information had been entered - merely by clerical error of numerical

transposition - on the docket sheet of the court clerk as having been untimely filed on April 21st,1972. A copy of the minutes of sentencing and the pertinent Docket Sheets are attached hereto for the court's edification as Exhibit A and Exhibit B respectively.

Obviously, April 21, 1972 was well after the commencement of the trial herein and, in accordance with the strict mandate of 21 U.S.C. 851, was fatally untimely to file a Second Offender Information against the Petitioner. The United States Attorney was acutely aware of this time discrepancy at the outset of the sentencing. Indeed, as the very first order of business, the United States Attorney attempted to explain away the untimely filed Information. This Court was advised that the appearance on the docket sheet of the date April 21, 1972 as the date of filing the Information was merely a clerical error of transposition of the numeral 1 and the numeral 2, and although the untimely date April 21, 1972 appears as the filing date of The Information, the actual date of filing, according to the representations of the United States Attorney, was alleged to be April 12, 1972.

What the United States Attorney conveniently withheld from this Court was that the actual document intended as the Second Offender Information filed herein by the United States

Attorney was date-stamped as having been filed in this court on April 21, 1972. Attached hereto and made part hereof as Exhibit C is a copy of the actual Information filed by the U.S. Attorney against the Petitioner together with the date stamp of the clerk's office.

Obviously, the date stamp of the Clerk of the Court is intended to definitively fix the date of filing of documents, including the Second Offender Information herein. And, obviously, the instant Information (Exhibit C) clearly bears a filing stamp of April 21, 1972. Apparently, the fact that the Information itself coincidentally bears the same late filing date as that which appears on the docket sheets of this case was never brought to the attention of this Court at sentencing, lest the coincidence would have alerted this Court and would have substantially undermined and diminished the glib representation and explanation of the U.S. Attorney that the appearance of the date April 21, 1972 on the docket sheet as the date of filing the Second Offender Information was merely an erroneous transposition. Indeed, the U.S. Attorney might then have been called upon to explain how the date stamp on the actual Information had also been transposed in the exact fashion as the docket sheet.

It is respectfully suggested that the legal presumption of regularity of the official records of this court and the clerk's office substantially supports Petitioner's instant claim that the Information was not timely filed herein.

Additionally, a careful perusal of the docket sheets in this case (Exhibit B) reveal certain facts which further fortify Petitioner's claim and have led to the inescapable conclusion of the intentional misrepresentation by the U.S. Attorney heretofore mentioned.

For instance, on April 17, 1972, the same date that trial herein began, this Court, in his own hand, endorsed a memo order denying Petitioner's then application to conduct an individual Voir Dire. A copy of the motion papers and the accompanying memo order are attached hereto as Exhibit D. The said endorsed memo order was then duly date stamped as filed in the Clerk's office and entered on the Docket Sheet on April 18, 1972 (Exhibits B and D).

This Court thus knows of his own knowledge that the said memo order denying the individual Voir Dire did not exist on April 12, 1972. Yet, that memo order, actually signed by this Court April 17, 1972, was entered on the Docket Sheet (Exhibit B) in earlier physical and chronological sequence than the docket sheet entry of the Second Offender Information alleged to have been filed and erroneously transposed April 12, 1972.

Indeed, had the Second Offender Information been actually filed and docketed on April 12, 1972, as alleged by the U.S. Attorney, but the entry merely erroneously transposed to read "April 21, 1972," such entry would have to have been entered on the docket sheets - in its

erroneously transposed state - in sequential order prior to the entry of the memo order this court hadn't signed until April 17, 1972.

Thus, Petitioner's late filing claim is indeed clearly supported by the official court records and the representations of the U.S. Attorney are further un-frocked by incontrovertible fact.

Further study of the Docket Sheet (Exhibit B) reveals an order permitting a medical examination of the Petitioner, which order was signed by this Court April 13, 1972. A copy of the papers which include this order is attached hereto as Exhibit E. This second order signed in this court's own hand obviously, did not exist on April 12, 1972. If this Court needed more proof of the actual date the said second order was signed - which is doubtful - Exhibit E also contains the signature of a U.S. Marshall who acknowledged receipt of the said order on April 13, 1972. Subsequent to its being signed, according to the Docket Sheets (Exhibit B) and the date stamp on Exhibit E, the order was filed on April 21, 1972. Yet, this Court's second order which did not exist on April 12, 1972, also found its way to the Docket Sheet in earlier physical and chronological sequence than the Second Offender Information.

It is respectfully submitted that it is physically and logically impossible for the Second Offender Information to have been filed in the Clerk's office and Docketed on April 12, 1972 - the victim of a simple mistake of transposition - and still appear in sequential order subsequent to 2 filed

and Docketed orders which did not even exist on April 12. 1972.

It seems apparent from the context of the sentencing minutes that the U.S. Attorney and his Assistants had to have known or had to have been recklessly indifferent to knowledge of all of the foregoing facts at the time the representation was made to this Court that the Information was timely filed. The purposes of such representation, it can only be conjectured, was to gravely prejudice the Petitioner and cause him to have his liberty denied substantially, regardless of due process of law, regardless of propriety or justice. Such acts are or should be inconceivable to a representative of the United States.

The failure to file a Second Offender Information, as aforesaid, is jurisdictional, cannot be waived or ignored, and the failure requires vacating of the sentence heretofore imposed and a re-sentencing of Petitioner. Whatever action should be undertaken, if this Court should indeed find the U.S. Attorney did purposely mislead this Court, is left solely to the discretion of this Court.

WHEREFORE, deponent respectfully prays that the within application be granted in every respect or in the alternative, a hearing be required to determine the actual

facts concerning the Second Offender Information filing together with such other and further relief as to the Court may seem just and proper.

Sworn to before me this
22 day of November, 1976

R.F.

/s/ John Nicholas Iannuzzi

MOTION EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America	
vs.	
Louis Cirillo, a/k/a Louis Schiotis, Louie,	72 Cr. 4
Defendant.	

U.S. Courthouse
New York, N.Y.
Nov 25, 1972
10:00 o'clock A.M.

BEFORE: HON. EDWARD WEINFELD, D.J.

APPEARANCES:

For the Government:
Whitney North Seymour, Jr.,
United States Attorney for the Southern District of New York;
and
Arthur Viviani, and
Dean C. Rohrer, Assistant U.S. Attorneys.

For the Defendant:
Albert J. Krieger, Esq.

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(Case called.)

MR. SEYMOUR: The government is ready, your Honor.

MR. KRIEGER: The defendant is ready.

THE COURT: You may proceed, gentlemen.

MR. SEYMOUR: If your Honor please, I believe the first order of business is to deal with the information that has been filed charging this defendant as a prior narcotics violator.

I hope that the information is before the court. If not, I have a copy of it for you.

THE COURT: I don't have it.

(Mr. Seymour hands document to court.)

MR. SEYMOUR: In connection with the copy of the information I am handing up to your Honor, there is one clerical error in the docket sheet downstairs that I would like to ask be corrected nunc pro tunc or the order. This information was in fact filed on April 12th. The docket sheet has the date transposed as being April 21st, which would make it actually after the commencement of the trial and is an error.

I would like to ask your Honor to direct that the docket be corrected to show the proper date.

THE COURT: What date?

MR. SEYMOUR: April 12th was the actual date of fil-

ing and a copy was served on counsel at that time.

THE COURT: All right. The defendant may be arraigned with respect to the information.

Have you served a copy upon Mr. Krieger?

MR. SEYMOUR: Yes, your Honor.

MR. KRIEGER: Your Honor, I received a copy some time ago.

THE COURT: Read the information to the defendant, Madam Clerk.

THE CLERK: "I, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, do accuse the defendant above named, who is also named in Indictment 72 Criminal 309, of having been previously convicted as hereinbelow described.

"The said defendant, on or about the 17th day of October, 1945, in the Southern District of New York, was duly convicted of violations of Title 21, United States Code, Sections 173 and 174, of having received, concealed, sold and facilitated the transportation, concealment and sale of heroin on pleas of guilty to both Indictment No. C.120/140 for a transaction involving about 10 ounces of heroin on December 15, 1944, and Indictment No. C.120/139 for a transaction involving about 15 ounces of heroin on March 5, 1945."

BY THE COURT:

Q Mr. Cirillo, do you acknowledge that you are the same person?

A Yes, I am.

Q That is, the person named in that information who was the person who was convicted before me.

A Yes, I am.

Q Do you make that statement of your own free will?

A Yes, sir.

Q Do you understand that you are not required to acknowledge your identity if you so desire and that the government may be put to its proof?

A Yes, sir.

Q Is it your desire to have the government put to its proof or do you desire to acknowledge that you are the same person?

A I acknowledge it.

Q Has any person threatened you or coerced you in any manner in order to get you to admit that you are the same person?

A No, sir.

THE COURT: All right, the admission of identity may be entered.

MR. SEYMOUR: Does your Honor wish to hear from the

government first?

THE COURT: I have no desire to hear from the government unless the government wants to be heard.

Of course, my policy is that I don't want any recommendation from the government on sentence.

MR. SEYMOUR: Of course, your Honor. We never make recommendations.

THE COURT: I will take recommendations from the Probation Department because I discuss matters with them, but you may make any statement of fact that you desire. I just don't want any recommendation.

MR. SEYMOUR: Of course, your Honor. What I do want to do, if I may, is to call the court's attention to some basic facts that I think are significant to your Honor's ultimate determination on this question.

I think it really is a fair statement that the defendant who stands before you has given his entire adult life to criminal enterprise.

As your Honor knows from the information that has just been read, he was first convicted of a narcotics offense relating to events back in 1944.

He had a subsequent conviction in the State courts for robbery in 1949 for which he received a 15-year sentence and served 7.

Subsequently he violated his parole.

In 1967 he was indicted in the Eastern District of New York on a narcotics violation. Unfortunately that case was not brought to trial because the principal government witness disappeared and was murdered.

I think it is also fair to say, your Honor, that the evidence in this case that your Honor heard really established a total disregard of lawful conduct.

I remind your Honor of an almost whimsical incident which took place when Signoli actually vouched for Preiss as having a record of committing armed robbery in order to improve his credibility with the defendant.

And your Honor will also remember that the man who was engaged to locate Preiss for the purpose of disposing of him was in fact a man with a long criminal record, and that, plainly, was the circle in which the defendant believed he should operate.

Obviously, the total disregard for the processes of this court in trying to eliminate the government witness, indeed, his disregard for the welfare of other government witnesses housed on Staten Island, I think, is another indication of the defendant's approach to things.

Now, with respect to the actual substantive violation here, your Honor, I think I can stand without fear of

contradiction and say that in the memory of any of the people connected with our office, this is the most important narcotics distributor ever tried and convicted in the Southern District of New York. It almost is an accident that it should have happened.

As your Honor will remember, the defendant took every precaution to insulate himself from the actual transaction. He had go-betweens. He used all sorts of precautions to try to make sure that nobody knew who he was. He used false names.

Your Honor will remember the incident in the coffee shop up on 57th Street when Rodino and Signoli were forced to wait for 15 minutes and Rodino began to get nervous, and Signoli explained that "this is the way. You have to wait here while you are watched to make sure that the coast is clear."

It is perfectly clear that if it hadn't been for the accident, really, of Signoli deciding that he couldn't simply come to the United States again to be picked a man like Rodino to be his representative, and that Rodino walked into the arms of the Bureau of Narcotics agents, I have no doubt that this defendant would never have been apprehended and he would still be at large distributing heroin in huge quantities to the Metropolitan area and, indeed, for all we know, the

United States.

Your Honor will also remember that the evidence in the case, although it related to two kilos of 100% pure heroin, also gave plenty of room for a inference that this was not by any means an isolated transaction.

You remember the conversation in the apartment house in Florida, the discussion about earlier trips Signoli had made, about the price that Signoli knew that Cirillo had paid to Mimi when they were negotiating price, which was plainly part of a continuing pattern of huge shipments of heroin.

Your Honor has not been officially made aware, but I would like to do so now, of the fact that following the jury verdict of guilty, the government obtained a search warrant and went to the premises, one of the premises, the principal residence of the defendant, and there, in execution of the search warrant, in the basement of the house, they found $100,000 in a metal box. And then, out in the back yard, after digging, they located an additional sum of $1,000,000 wrapped up in a plastic garbage bag, some of it wrapped up in metal foil, obviously intended to a long-term preservation, plainly conduct that, in light of all of the other testimony and proof in this case, your Honor, I think, could fairly infer represented the profits from this sinister traffic.

Now, I think the only real question I can leave with

your Honor is how your Honor will really react to the unusual opportunity to say to the world at large and the other Cirillos, or would-be Cirillos, that despite their efforts to insulate themselves and try to protect themselves in engaging in this kind of traffic which in fact deals with the welfare of hundreds of thousands of human beings, and possibly even the deaths of those who are brought into the medical examiner's office, this this is not a traffic that they should engage in, and the glitter of the millions of dollars in profits here is not worth the risk of a substantial deterrent for this offense.

THE COURT: First, Mr. Kriegler, I will hear you, and then I will hear the defendant himself.

MR. KRIEGER: If your honor please, the matters to which defense counsel must address himself at this moment are never easy, and in many respects impose almost an impossible task upon any lawyer. He is to stand here as an advocate and yet also as an officer of this court and in some mysterious alchemy is supposed to separate himself from advocacy and to act as an impartial advisor, if I may be so presumptious, to the court at this most critical of moments in the defendant's life.

I have tried very, very hard, your Honor, in past representations of other defendants at times like this, to try to be dispassionate, to try to be impartial, and tried to serve that mysterious standard. I don't think any lawyer is truly

capable of reaching that standard, but we try, and I try.

I do recognize, your Honor, the seriousness of the crimes with which Mr. Cirillo has been charged and convicted, and I recognize, also, that it is inappropriate to try to argue from a predicate of the facts as the jury has found them to be.

I think it is appropriate and proper, however, to argue as to the person himself because in the unique one-on-one situation when the court faces the defendant and says to the defendant "I am taking away your liberty for a certain number of years," then the court assumes even more than a man-like role; the court assumes some of or almost divine power in that the court is dealing with human life.

I think the court also has a problem in imposing sentence because the court must look beyond the man. As Mr. Seymour sought to indicate to the court, the court also serves the community. I think counsel serve the community also, as well.

The problems, however, differ. In the very next few moments from now, when this court will look at Mr. Cirillo, I hope that the court will think of some other things than those to which Mr. Seymour sought to call to the court's attention.

Mr. Cirillo, number one, is a human being. As Russell Baker said this morning in another context, in a humorous column in the Times, "This country pins its hope on jail."

If this country pins its hopes or fail in this area, then we will continue to have the failures to society that have marked the history of narcotics control.

THE COURT: What do you think ought to be done with a person convicted of this type of crime?

MR. MINTZER: I think we are talking about numbers of years as opposed to jail, your Honor.

Please do not misunderstand my remarks to be a plea for probation, or for a suspended sentence. I realize that in the structure of our jurisprudence such a thing would be improper, it would be laughable, and it would be an insult to the court and to all of the proceedings were for me to come by with that kind of remark.

But I think, your Honor, when we talk about numbers of years we are bringing up things of great importance.

Louis Cirillo is a man 40 years of age. As the court knows, he has three children, he has a wife, he has a sister, and he has a mother and father still living.

I think it is fair to state, because we must be pragmatic about this, that the sentence which will probably be imposed here will mean that when Mr. and Mrs. Cirillo, the elder Mr. and Mrs. Cirillo, pass on to their heavens, Louis Cirillo, the defendant here, will still be confined in jail.

I think it is fair to state that when his son

carries he will be in jail. I think when his grandchildren are confirmed he will be in jail. He will spend the rest, the few years that are left to him, in jail. Ten more years are much more precious to a man--the 50's are much more precious to a man than the 70's. They mean considerably more, the value of each year when a man is approximately 50 cannot be compared with the value of a year when a man is approximately 70.

Now, when I said that the country puts a man on jail, I was trying to direct them somewhat to what Mr. Seymour had indicated to the deterrent value of any sentence imposed here.

Mr. Bowman tried to qualify violations along the roadside. I do not think our history indicates that the crime rate decreased as a result of a corpse rotting on a cross.

In Asian years offenders were drawn and quartered, and carpenters had their hands cupped off.

Now, apparently we strive to be more human. We throw a man in a cage.

I don't think, your Honor, that our history has shown punishment, per se, to be an effective deterrent. Certainly the death penalty has not halted homicides.

I stress this, your Honor, because I appreciate the feelings which come from this case. I appreciate the

fact that the numbers of years within which the court has the scope of sentence here amount to more than a possible lifetime for the defendant Cirillo.

I think, as a practical matter, your Honor, there can be a sentence imposed upon the defendant Cirillo which would protect society, if society need be protected from further criminal activity on the part of Cirillo, if he desired to commit further criminal activity. Yet there also is a cut-off point where he could be returned to his family to live out whatever few years he has as a person or as a comparatively free man, that the law need not find satisfaction only in taking away, realistically speaking, every remaining day of this man's life.

All of society's needs, all of justice's needs, can be met with a sentence that does not necessarily polarize itself towards the maximum.

In the absence of any questions, your Honor, I have nothing further to add.

THE COURT: Mr. Louis Cirillo, do you want to make any statement on your own behalf or to set forth any reason why the judgment of this court should not be imposed upon you?

THE DEFENDANT: Your Honor, all I can say is that I still have to face my family. I am not the monster that I am made out to be.

THE COURT: In the matter of sentence, this court seeks to evaluate the factors that are favorable to the defendant just as it takes into account the community interest.

Upon the information submitted to me and such information as I derived from the trial over which I presided, there is not single redeeming feature favorable to the defendant.

Brought up by law-abiding parents, he has led a life of crime for more than 21 years. Such business activities that on the surface appear lawful were merely a facade or a cover-up to conceal his illicit conduct.

The defendant's criminal record started soon after he left high school. There were numerous arrests, but only three convictions to date.

In July, 1943 he was indicted for burglary and possession of burglar's tools, which was reduced to petty larceny and he was placed on probation in October 1945. Mr. Seymour made reference to this.

He was convicted in this court of the sale of heroin and sentenced to three years, and in November of the same year he was sentenced to two years to run concurrently with the three-year sentence.

In 1948, a year after his release on the narcotics charge, which he acknowledged here this morning, he was

charged with assault and robbery with a gun, which was reduced to robbery in the second degree, and he was sentenced to 7 1/2 to 15 years.

Following his release on parole, he was subsequently found to be a parole violator and was again committed to State Prison from which he was released in February, 1963.

Several indictments followed, one for a narcotics violation in 1967, which was dismissed. In the instance of the 1967 narcotics charge, the dismissal was due to the fact that the principal witness, a female, disappeared. Whether or not it is fact, the authorities believe that she was murdered.

Then, in October, 1971 came the present charge which involved a conspiracy to import vast quantities of narcotics and the actual receipt by the defendant of 160 pounds of pure heroin.

There cannot be the slightest doubt that the defendant is one of the largest distributors of narcotics in the United States with close connections with foreign suppliers.

There is evidence to support the claim that although he himself is not a user, he has supplied approximately 1/6th of the 6 tons of heroin consumed by addicts in this country each year.

His illicit activities have grown from year to year, and his transactions have run into millions of dollars.

His criminal conduct has brought untold misery to thousands upon thousands of men, women and children and, as was suggested, indeed, deaths in a number of cases.

The impact of his crimes go beyond these unfortunate victims of his wrongdoing. It has spawned other crimes by addicts to get their narcotics.

The interests of society require that it be protected from this defendant. Also, that the sentence imposed may hopefully serve as a deterrent to others.

Accordingly, taking into account those factors which I deem significant on the issue of sentence, the court imposes a sentence of 25 years. The sentence is imposed on each count to run concurrently, and a special term of parole is imposed of 10 years.

Now, Ronda Cirillo, it is my duty to advise you that with respect to your conviction, you have a right to appeal that judgment of conviction, and if an appeal is to be taken, it must be done within 10 days. If you are without funds to prosecute an appeal, upon a proper application the court will assign counsel to represent you. Do you understand that?

THE DEFENDANT: Yes.

MR. KAUFMAN: If your Honor please, I will undertake to file a notice of appeal on behalf of the defendant

and I, too, have advised him of his right to appeal. The notice of appeal will be filed today or tomorrow.

I have an application, if your Honor please.

THE COURT: What is your application?

MR. KRUGER: Your Honor, the defendant has not been confined at West Street over the last week or so, and in my last conference with the defendant certain matters have come up concerning the appeal wherein there may be a problem as to who is going to represent the defendant on appeal.

I state candidly to the court that at the present moment I will probably represent the defendant on appeal but I also state candidly to the court that there is a matter of disagreement as between the two of us.

The defendant, therefore, has to straighten out this question fairly soon; otherwise he is liable to run into default under a very strictly-applied appellate rule.

I would request that the defendant be kept at West Street for a reasonable period of time, your Honor, until this matter is settled.

I don't know what the plans are in regard to him as to whether, under the normal course of events, he would stay at West Street until he goes to the penitentiary designated, or what, but I would like to be somewhat assured, on the defendant's behalf, that he would be here for 10 days to

two weeks, your Honor.

THE COURT: Well, I had been aware, of course, that he has not been at West Street for the past week or so; indeed, you made an application to me at that time and I told you that since the government felt there was a security problem and that my commitment was to the custody of the Attorney General, that it was up to the Attorney General and the Bureau of Prisons, and if the government takes the position that there still remains a security problem, I see no basis upon which the court can interfere.

MR. KRIEGER: We are at a different point in time, your Honor. Prior to sentence one body of law applies. Post-sentence the defendant, if he chooses, may elect not to serve his sentence in order to stay closely within the district of conviction.

THE COURT: I thought that rule was rescinded--was it not?--the election not to serve? There is no such rule now, is there?

MR. KRIEGER: I am fairly sure that he can still elect not to serve.

THE COURT: Show me the rule.

(Continuing) I thought it was repealed because the defendants were increasing the lengths of their sentences and saying that they didn't know what they were doing at the time

MR. KRIEGER: If I am mis-stating a rule, your Honor, I apologize to the court. I will look it up to determine whether he has the right or not, but the defendant wishes to stay here, sincerely, your Honor.

THE COURT: If you say that he has a right under the rule, and if the rule is still in existance, all he needs to do is exercise his rights. What do you require from the court?

MR. KRIEGER: Well, I am trying to avoid the necessity of--if such a right exists--if there is such a right--of his losing any time on his sentence.

THE COURT: Mr. Seymour, what is your position?

MR. SEYMOUR: Your Honor, I can't help on the question of the rule.

I will advise the court that the present plan is to move the defendant out of West Street tomorrow. We will undertake to discuss with Mr. Krieger the practical problems of the need to consult with him and if it is possible to accommodate him, we will.

We do have a security problem, and we have to recognize that, and at the same time I don't want to interfere with counsel's discussions with his client. I think we will try to balance the two.

THE COURT: I am going to see counsel--I think you

are aware of this--tomorrow morning with respect to the indictment that is pending against him on the conspiracy to obstruct justice. Now, if there is a purpose to proceed with that case, I plan to fix a date for trial.

MR. SEYMOUR: Your Honor, the government does intend to go forward with that trial and will be ready tomorrow morning. And obviously, when and whether that case goes to trial will obviously require the defendant to be present.

MR. KRIEGER: I certainly won't be ready to proceed to trial tomorrow morning.

THE COURT: No. The matter that is on tomorrow morning is concerning the various motions that have been made on behalf of the defendant.

I don't remember if there was a motion made by you, Mr. Krieger, as well, but I plan to dispose of those motions, and if the purpose of the government is to proceed to trial, subject to other calendar commitments, I plan to fix a date for trial tomorrow.

MR. KRIEGER: I would certainly request that the defendant be kept within easy reach of myself because I am going to try the case. I don't want to spend a day-and-a-half going back and forth to Lewisburg every time I have to confer with my client.

MR. SIMMONS: Your Honor, I will submit, we recognize counsel's dilemma. We will try to accommodate him in balancing the other problem.

I don't think your Honor has to be involved.

THE COURT: All right. Then being no other business, the record will stand adjourned.

(Contents excluded.)

CRIMINAL DOCKET

MOTION EXHIBIT B

UNITED STATES DISTRICT COURT JUDGE WEINFELD A 33 72 CRIM 309

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Dean C. Rohrer, Ext.6470
LOUIS CIRILLO a/k/a Louis Schiotis and Louie.	
	For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
			6/5/72	A J Kreiger	5—	
J.S. 2 mailed ✓	Clerk		6/6/72	M S Thomas		5—
J.S. 3 mailed ✓	Marshal					
~~Mag.~~ Comp.#72-0190	Docket fee					
Title 21 & 18						
Sec.812,841(a)(1)841(b)(1)(A) 846,963 & 2.Possess with intent to distribute heroin,I (ct.2)conspiracy so to do (ct.1) two counts						

DATE	PROCEEDINGS
3-17-72	Filed Indictment.
3-21-72	Deft.(atty. Al Kreiger and AUSA Viviani, Updike and Rohrer present Waives the formal reading of the Indictment and pleads Not guilty. Same bail as in Indictment #72 Cr. 4 fixed at #250,000.00 Cash or Surety Bond and additional Personal Recognizance Bond of $500,000.00 Special conditions of Bail to be incorporated in Bond 1. Deft. neither seek or apply for a passport. 2. -Deft. is to report to the U.S. Marshal every Monday at 12 noon. 3. Deft. is to telephone Ass't Twice Daily, once in the A.M. and once in the P.M. 4. Deft. is confined to Manhattan and the Bronx and is enjoined from appearign at any Bus Terminal, Railroad Station, Ship Terminal or any place of transportation. 5.-Deft. is to notify Ass't U.S. Att'y if he wishes to vist his faughter in Yonkers. Trial set for April 17, 1972 at 10:00A.M. Weinfeld, J.
-18-72	Filed notice of motion for an opportunity to conduct individual voir dire

(over)

DATE	PROCEEDINGS
4-5-72	Filed- Govt's. bill of particulars.
4/10/72	LOUIS CIRILLO - Filed following papers received from U.S. Magistrate Docket sheet $250,000 post indictment, bond Stuyvesant Ins
4-18-72	Filed memo. endorsed by Judge Weilfeld, dated 4-17-72 on motion for individual voir dire. Motion denied. (see file) (n/m)
4-21-72	Filed- Order that the U.S. Marshal transport the Deft. to the offices of Dr. Arnold Berrett, for undergoing medical diagnostic procedures. Weinfeld, J.
4-21-72	Louis Cirello Filed- Second information of offender.
	~~Victor Panessa Filed second information of offender.~~ error
	~~Albert Piccolo Filed second information of offender~~ error
**4-4-72	Hearing held on deft's application to adjourn trial date-denied. Govt's application to increase bail, adj'd to 4-5-72. WEINFELD,J.
4-5-72	Motion to increase bail-denied. WEINFELD,J.
4-17-72	Jury trial begun before WEINFELD,J.
4-18-72	Trial cont'd.
4-19-72	Trial cont'd.
4-20-72	Trial cont'd.
4-21-72	Trial ~~cont'd~~ adj'd to 4-24-72 10AM due to deft's illness.
4-24-72	Trial cont'd.
4-25-72	Trial cont'd & concluded. Jury verdict-deft guilty as charged. Bail exonerated. Deft remanded(no bail) Pre-sentence investigation ordered. Sentence adj'd to 5-25-72 10AM. WEINFELD,J.
4/26/72	LOUIS CIRILLO - Filed order that the bail in the amount of $250,000 surety bond & the $500,000 P.R B. under indictments 72 cr. 4 & 72 cr. has been exonerated. 4/26/72 WEINFELD J.
6-2-72	Louis Cirillo- Filed notice of appeal to the U.S. C.A. from the judgment entered 5-25-72. (fee Paid)

(SEE PAGE 3)

DATE	PROCEEDINGS
5-25-72	Filed Judgment(Atty.present)It is Adjudged that the deft is hereby committed to the custody of the Atty.Gen. or his authorized representative for imprisonment for a period of TWENTY-FIVE (25) YEARS on each of counts 1 and 2, to run concurrently with each other. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, deft is placed on Special Parole for a period of TEN(10) YEARS, to commence upon expiration of confinement.....WEINFELD,J...
6-14-72	Filed transcript of record of proceeding dated April 20,21,24, and 25 1972.
[illegible]	[illegible]
6-23-72	Filed Transcript of record of proceedings, dated Apr. 17, 18, 19, 1972
6-23-72	Filed Transcript of record of proceedings, dated Apr. 25, 1972
7-7-72	Filed record of notice on appeal has been certified and transmitted to the U.S.C.A. dated 7-7-72
7-6-72	Filed memo endorsed Deft. letter is deemed a motion for reduction of sentence. Motion denied Weinfeld, J. (N/M)(see file)
6-13-72	Filed remand dated 4-25-72
8-8-72	Filed Govt's supplemental bill of particulars
8-8-72	Filed Govt's memorandum of law - Preliminary statement
8-8-72	Filed defts. request to charge
8-8-72	Filed defts. supplemental request to charge
8-8-72	Filed Govt's request to charge
5-23-72	Filed Commitment & entered Return Deft. Delivered to Fed Detention Hdqrts N.Y. 5-25-72
12-6-72	LOuis Cirillo-Filed true copy of C.A. order affirming the D.C. Judgment. Judgment entered 12-6-72. filed opinion.
4-3-73	Cirillo-Filed true copy of the Judgment of the Supreme Court of the U.S. for petition of writ of certiotari, Petition denied.
7-17-73	Cirillo-Filed affidavit and notice of motion for an order reducing sentence.
8-1-73	LOUIS CIRILLO. Filed AFFIDAVIT from Arthur J. Viviani, AUSA, in opposition to defendant's motion to reduce and/or modify sentence.
8-22-73	LOUIS CIRILLO: Filed AFFIDAVIT, from Arthur J. Viviani, AUSA, in opposition to motion of defendant to photocopy at his expense Government Exhibits 1 through 29.

D. C. 109 Criminal Continuation Sheet

DATE	PROCEEDINGS
8-17-73	LOUIS CIRILLO: Filed NOTICE OF MOTION and an AFFIDAVIT requesting that defendant be provided with government Exhibits 1 through 20 offered and and received at his trial.

A-37

EXHIBIT C- SECOND OFFENDER INFORMATION

DCR:ka
72-0190

72 CR 309

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

-v- :

LOUIS CIRILLO, a/k/a
Louis Schiotis, Louie, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

INFORMATION

Section 851 of Title 21, U.S.C., relating to Indictment 72 Cr. 309 filed the 17th day of March, 1972.

I, WHITNEY NORTH SEYMOUR, Jr., United States Attorney for the Southern District of New York, do accuse the defendant above-named who is also named in Indictment 72 Cr. 309 of having been previously convicted as hereinbelow described.

The said defendant, on or about the 17th day of October 1945, in the Southern District of New York, was duly convicted of violations of Title 21, United States Code, Sections 173 and 174, for having received, concealed, sold, and facilitated the transportation, concealment and sale of heroin, on pleas of guilty to both Indictment No. C 120/140, for a transaction involving about ten (10) ounces of heroin on December 15, 1944, and Indictment No. C 120/139, for a transaction involving about fifteen (15) ounces of heroin on March 5, 1945.

Whitney North Seymour Jr.

WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

_____ being duly sworn,

deposes and says that he is employed in the office of _____

_____ United States Attorney for

the Southern District of New York, attorney for the _____

herein.

That on the _____ day of _____, 19 ___, he did serve a true copy of

the hereto annexed _____

_____

on the office of _____

attorney for the _____ herein, located at _____

_____

Borough of _____, City of New York, by leaving a true copy of the same with

the person in charge of said office, there being no one present who was authorized to give an admission

of service.

_____

Sworn to before me this

_____ day of _____, 19___

_____

AFFIDAVIT OF MAILING

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS

Dean C. Rohrer being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Southern

District of New York.

That on the 10th day of April, 1972, he served a copy of the within

Information

by placing the same in a properly franked envelope addressed to:

ALBERT J. KRIEGER, ESQ.

401 BROADWAY

NEW YORK, NEW YORK

And deponent further says that he sealed the said envelope and placed the same in the mail chute

drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of

New York.

Dean C. Rohrer

Sworn to before me this

10 day of April, 1972

Walter McLaughlin

(Rev. 10-25-65)

DCR:msf
72-0190

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

A 39

U. S. DISTRICT COURT
FILED
APR 21 1972
S. D. OF N. Y.

ease take notice that a ——— within is a copy, was this day in the within entitled action, in the Clerk of this Court.

Y., ———, 19——

Yours, etc.,

United States Attorney
Attorney for ———

Attorney for ———

ake notice that the within ——— esented for settlement and sig- the Honorable ——— tes District Judge, at the office of Room 601, United States Court- ley Square, Borough of Manhattan, ew York, on the ——day of ———, t 10:30 o'clock in the ——— noon, thereafter as counsel can be heard.

N. Y., ———, 19——

Yours, etc.,

United States Attorney
Attorney for ———

Attorney for ———

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

LOUIS CIRILLO, a/k/a
Louis Schiotis, Louie,

Defendant.

INFORMATION

Section 851, Title 21, U.S.C.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Attorney for U.S.A.
TEL. 264-5311
6428

Due service of a copy of the within is hereby admitted.

New York, ———, 19——

Attorney for

To

Attorney for

FPI—SS—1-13-70—30M—1926

MOTION EXHIBIT D

A 40

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LOUIS CIRILLO,

Defendant.

NOTICE OF MOTION

72 Cr. 309

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of IVAN S. FISHER, duly verified the 11th day of April, 1972, upon the indictment and all proceedings heretofore had herein and further upon copies of certain pre-trial publicity relating to the above prosecution, the defendant LOUIS CIRILLO will, on the 17th day of April, 1972, move this Court before the Honorable Edward Weinfeld, at the United States District Court for the Southern District of New York, United States Courthouse, Foley Square, County, City and State of New York, for a continuance of the trial presently scheduled to commence on April 17, 1972 or in the alternative for an order granting counsel for the defendant the opportunity to conduct an individual voir dire of the prospective jurors in this case or in the alternative for an individual voir dire of the prospective jurors to be conducted by the Court including therein certain proposed questions to be specified in the accompanying affidavit or again in the alternative for the questioning by the Court of the prospective panel with regard to certain specific areas of concern to the defendant, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
April 14, 1972

Yours etc.,

IVAN S. FISHER
Office & P. O. Address
401 Broadway
New York, New York 10013

TO: HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney For The
Southern District of New York

LAW OFFICES
ROBERT J. KRIEGER
401 BROADWAY
NEW YORK, N. Y. 10013

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LOUIS CRICCIO,

Defendant.

AFFIDAVIT

72 Cr. 309

State of New York)
: ss.:
County of New York)

EVAN S. FRANKEL, being duly sworn, deposes and says:

I am associated with ROBERT L. KRIEGER, attorney for the defendant, LOUIS CRICCIO, and make this application in support of the various relief delineated in the accompanying Notice of Motion.

Defendant Criccio's first request for relief is for a continuance of the trial of this matter presently scheduled for April 17, 1972. This application is necessitated by the fact that we submit defendant Criccio cannot receive a fair trial before a fair and impartial jury at this time. Reference is specifically made to an article appearing in the New York Daily News on April 11, 1972, a copy of which is annexed hereto and marked as Exhibit A. This article deals with an indictment recently returned against the defendant Criccio as well as with the substance of the allegations relating to the instant indictment. The article appears under a headline relating to a $600,000.00 drug ring and to a plot to "bump off" certain people. We are confident that the vast majority of the 1,000,000 plus readership of the New York Daily News amongst whom people likely to be jury panelists in the forthcoming trial

This application for a continuance is based as well on a book and film entitled "The French Connection". This book appeared as a best seller approximately two years ago and I am informed it has been a best seller.

LAW OFFICES
ARNOLD S. KRIEGER
100 BROADWAY
NEW YORK, N. Y. 10038

The movie of the same title was released approximately eight months ago to tremendous accompanying publicity and box office success. "The French Connection" deals with the importation into this country of a large quantity of heroin in an automobile. The participants to this importation are portrayed as Frenchman as the importers and Americans as the recipients. In late February of this year, I represented the defendant Orsini in UNITED STATES V. ORTEGA, ET AL. before the Honorable Lawrence Pierce. There as a result of the individual voir dire conducted by the Court of the panel, at least one prospective juror specifically stated that as a result of his having seen "The French Connection" he would be unable to render a fair and impartial verdict in that case which involved as well an automobile importation.

The potential of prejudice to the defendant as a result of the movie "The French Connection" has been recently increased by reason of the fact that this picture was awarded five academy awards on Monday, April 10, 1972. These awards were made during the course of a lengthy television program in which portions of the film were shown.

In the event the Court denies this motion for a continuance we respectfully request the opportunity to conduct an individual voir dire of the prospective jurors limited to efforts to uncover possible prejudice resulting from the contamination of either the newspaper publicity or of "The French Connection". While we recognize that this is an unusual procedure in this District we nevertheless submit that this is an unusual case by virtue of this pre-trial publicity. Furthermore, I know that it was Mr. Krieger's experience in a prosecution in the United States District Court for the District of Arizona in UNITED STATES V. BONANNO that prejudice or bias not uncovered by the Court's general voir dire was in fact uncovered during the course of counsel's voir dire of the proposed

LAW OFFICES
ALBERT J. KRIEGER
401 BROADWAY
NEW YORK, N. Y. 10013

jurors.

Should the Court deny this application as well we would ask in the alternative that the Court conduct an individual voir dire of the proposed jurors inquiring as follows:

(1) Are you familiar with in any fashion the book or motion picture "The French Connection"?

[If the answer is "Yes" then the following questions should be proposed.]

(2) In what manner?

(3) What is your knowledge of this subject?

(4) In the course of the trial of this case it may be alleged that narcotics were smuggled into this country concealed in an auromobile. Would you be inclined to believe these allegations more readily because of your familiarity with "The French Connection"?

(5) Have you heard of this case, the defendant Louis Cirillo, or the names of any of the people whom I have mentioned to you in familiarizing you with the indictment prior to your coming into this court room.

Should the Court deny our application for an individual voir dire to be conducted by the Court and feel that the questions proposed to the Court above should not be asked of the panel, then I respectfully request the Court to in some manner that it sees fit inquire into the possible prejudice emanating from the pre-trial publicity and "The French Connection".

WHEREFORE, your deponent respectfully prays that the relief

A 44-A-46

sought herein be granted, and for such other and further relief as to this Court may seem just and proper.

IVAN S. FISHER

Sworn to before me this 14th

day of April, 1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LOUIS CIRILLO,

Defendant.

STIPULATION

72 Cr. 309

IVAN S. FISHER
ALBERT J. KRIEGER
ATTORNEY AT LAW
401 BROADWAY
NEW YORK, N. Y. 10013

Edward Weinfeld
U.S.D.J.

No motion to dismiss
April 7, 1972.

A-47

MOTION EXHIBIT E

A 48

U.S. DISTRICT COURT FILED APR 21 1972 S.D. OF N.Y.

DCR:msf
72-0190

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA : ORDER

-v- 72 Cr. 309 (EW)

LOUIS CIRILLO, :

Defendant. :

Upon hearing the application of the defendant Louis Cirillo and the Government not objecting thereto, it is hereby

ORDERED, that the United States Marshal transport the said Louis Cirillo to the offices of Dr. Arnold Berrett at 1040 Park Avenue, New York, New York, arriving there by 4:00 P.M., April 13, 1972, for the purpose of undergoing such medical diagnostic procedures as Dr. Arnold Berrett chooses; and it is further

ORDERED, that at the conclusion of such tests, the United States Marshal shall forthwith return the defendant Louis Cirillo to the Federal House of Detention at 427 West Street, New York, New York.

Edward Weinfeld
United States District Judge

Dated: New York, New York
April 13, 1972.

3

day of , 19

STATE OF NEW YORK
COUNTY OF NEW YORK } SS

_____ being duly sworn,

deposes and says that he is employed in the office of _____ United States Attorney for

the Southern District of New York, attorney for the _____

herein.

That on the _____ day of _____, 19 ___, he did serve a true copy of

the hereto annexed _____

on the office of _____

attorney for the _____ herein, located at _____

Borough of _____, City of New York, by leaving a true copy of the same with

the person in charge of said office, there being no one present who was authorized to give an admission

of service.

Sworn to before me this

_____ day of _____, 19___

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF NEW YORK } SS

_____ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Southern

District of New York.

That on the _____ day of _____, 19 ___, he served a copy of the within

_____

by placing the same in a properly franked envelope addressed to: _____

_____

_____

_____

And deponent further says that he sealed the said envelope and placed the same in the mail chute

drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of

New York.

Sworn to before me this

_____ day of _____, 19___

A 50

will please take notice that a ____
ch the within is a copy, was this day
ntered in the within entitled action, in
fice of the Clerk of this Court.

xl, N. Y., ____, 19____

Yours, etc.,

United States Attorney
Attorney for ____

Attorney for ____

se take notice that the within ____
e presented for settlement and sig-
e to the Honorable ____
d States District Judge, at the office of
lerk, Room 601, United States Court-
Foley Square, Borough of Manhattan,
f New York, on the ____ day of ____,
, at 10:30 o'clock in the ____ noon,
oon thereafter as counsel can be heard.

ed, N. Y., ____, 19____

Yours, etc.,

United States Attorney
Attorney for ____

Attorney for ____

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

LOUIS CIRILLO,

Defendant.

ORDER

72 Cr. 309 (EW)

WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Attorney for USA

TEL. 264-2211K
6470

Due service of a copy of the within is hereby admitted.

New York, ____, 19____

Attorney for

To

Attorney for

FPI—S3—1-15-71—2.0M—6229

UNITED STATES MARSHAL'S RETURN (CIVIL)
SOUTHERN DISTRICT OF NEW YORK

I hereby certify and return that I received this order on the 13 Day of April 1972, and executed same by transporting the within name LOUIS CIRILLO to Undergo Medical diagnostic procedures at 1040 Park Ave, New York City. At the conclusion the defendant was transported and returned to the Federal House of Detention, at 427 West Street, New York, New York.

THOMAS E. FERRANDINA
U.S. MARSHAL, SDNY

BY Frank J. Bove
FRANK J. BOVE
DEP/U.S. MARSHAL, SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

- v - : AFFIDAVIT

LOUIS CIRILLO, a/k/a "Louis Schiotis", a/k/a "Louie", : 72 Cr. 309 (EW)

Defendant. :

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

RICHARD F. LAWLER, being duly sworn deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and as such am in charge of the motion made by the defendant in this case.

2. This affidavit is submitted in response to defendant's Motion to Vacate Sentence and for the purpose of requesting a further adjournment of defendant's motion.

3. I had earlier requested the court file in this case from the clerk's office. On November 26, 1976 I was informed that the file had been closed and sent to New Jersey for storage. As I informed the Court I ordered retrieval of the file from New Jersey. On December 6, 1976 I was informed by Rosemarie Fuguetti, Deputy Clerk, Supervisor of Closed Files, that the storage facility in New Jersey only had the trial transcript and that the file was in the Court of Appeals.

RFL:mkb

4. That same day I went to the Court of Appeals and was informed by a clerk that the file had been returned to the District Court. (Attached is a copy of the Court of Appeals' docket sheet indicating the file was returned to the District Court on February 14, 1973.)

5. I then went to the Orders and Appeals Section of the District Court and was informed by the apervisor, Mr. Edward Aponte, that his records showed the file to still be in the Court of Appeals.

6. Finally, on December 6, 1976 I was informed by Mrs. Fuguetti that the file could not be found.

7. I immediately requested a search by Mrs. Fuguetti's office in an effort to locate the file as quickly as possible.

8. To date the search has not been successful and the file has not been found.

9. The file in this case is of crucial importance to the preparation of a response to the defendant's motion.

WHEREFORE, the Government respectfully requests a further adjournment of three weeks on defendant's motion in order to see if the file can be located.

/s/

RICHARD F. LAWLER
Assistant United States Attorney

Sworn to before me this
9th day of December, 1976.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

CASE NO. 7 -[illegible]	U.S.A. v. Louis Cirillo, etc.

DATE	FILINGS PROCEEDINGS	Fil-l
6-8-72	Filed copies of docket entries and notice of appeal	
6-9-72	Received docket fee	
7-7-72	Filed record (original papers of district court)	
7-13-72	Filed order directing appellant's brief and appendix to be filed by 8-31-72; if appellant's brief or appendix is not filed by time directed, clerk is directed forthwith to dismiss appeal; appellee's brief to be filed by 10-2-72; argument to be heard week of 10-16-72	
7-25-72	Filed motion for extension of time to file appellant's brief with proof of service	
8-[illegible]-72	Filed affidavit in opposition to motion for extension of time with proof of service	
8-30-72	Filed order amending order of 7/13/72; appellant's brief and appendix to be filed by 9/11/72; if appellant's brief and appendix is not filed by time directed, clerk is diercted forthwith to dismiss appeal; U.S. to file brief by 10/11/72; argument to be heard during week of 10/16/72.	
9-7-72	Filed motion for leave to file 4 tw copies of appellant's brief and for extension of time to file appendix with proof of service	
9-8-72	Filed order granting motion for leave to file 4 tw copies appellant's brief by 9-11-72 and to extend time to file appellant's printed brief and joint appendix to 9-15-72	
9-11-72	Filed 3 page proof copies brief, appellant's with proof of service	
9-12-72	Filed appendix, appellant's Vols. I, II with proof of service	
9-[illegible]-72	Filed printed brief, appellant's with proof of service	
10-10-72	Filed brief, appellee with proof of service.	
10-20-72	Argument heard (by: Waterman, Smith & Kaufman, CJJ)	
11-6-72	Judgment Affirmed, Kaufman, CJ	
11-6-72	Filed judgment	
11-29-72	Filed copy of notice by Supreme Court granting extension of time to file petition for writ of certiorari to 1-5-73	

(see page 3

AFFIDAVIT OF DEAN C. ROHRER A 54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

-v- : AFFIDAVIT

LOUIS CIRILLO a/k/a/ Louis Schiotis, Louie, : 72 Cr. 309

Defendant. :

----------X

STATE OF CONNECTICUT)
) ss.:
COUNTY OF FAIRFIELD)

DEAN C. ROHRER, being duly sworn, deposes and says:

1. I am an attorney presently practicing law in Stamford, Connecticut. In 1972 I was an Assistant United States Attorney in the office of Whitney North Seymour, Jr. in the Southern District of New York and as such was involved in the prosecution of this case.

2. I have examined the attached copy of the Information and the affidavit of mailing. The signature on the affidavit is mine.

3. Though I do not at this time have any independent recollection of mailing or filing the Information my signature indicates that I mailed the document on the 10th of April 1972.

4. It was my normal practice at that time to have filed any papers with the Court at or about the same time I mailed such papers.

5. I have no reason to believe that I did not follow my normal practice with the attached Information.

DEAN C. ROHRER

Sworn to before me this
29th day of December, 1976

Notary Public
Commission Expires 3/30/77

A 55

...ED STATES DISTRICT COURT
...UTHERN DISTRICT OF NEW YORK

APR 21 1972
S. D. OF N. Y.

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...ED STATES OF AMERICA :

-v- :

...IS CIPILLO, a/k/a :
...Louis Sabiotis, Louie,

Defendant. :

- - - - - - - - - - - - - - - - - x

INFORMATION

Section 851 of Title 21, U.S.C., relating to Indictment 72 Cr. 309 fi... the 17th day of March, 1...

I, WHITNEY NORTH SEYMOUR, Jr., United States Attorney ... the Southern District of New York, do accuse the defendant ...ve-named who is also named in Indictment 72 Cr. 309 of ...ing ... previously convicted as hereinbelow described.

The said defendant, on or about the 17th day of ...ber 1945, in the Southern District of New York, was duly ...ted of violations of Title 21, United States Code, ...ions 173 and 174, for having received, concealed, sold, ... facilitated the transportation, concealment and sale ... heroin, on plea ... guilty to both Indictment No. C 120/140, ... a transaction ... lving about ten (10) ounces of heroin ... December 15, 19..., and Indictment No. C 120/139, for ...nsaction involving about fifteen (15) ounces of heroin ... March 5, 1945.

...
United States Attorney

That on the ____ day of _____, 19 ___, he did se[rve]
the [within] upon
[the] attorney for the _____ herein, located at _____
[in the] City of New York, by leaving a true copy
[with] the [person in charge] of said office, there being no one present who was authorized to [re]
of _____

[Sworn] to before me this
____ day of _____, 19 ___

AFFIDAVIT OF MAILING

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Dean C. Robb, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of April, 1972, he served a copy of the within

by placing the same in a properly postpaid envelope addressed to:

ALBERT J. KRIEGER, ESQ.
401 BROADWAY
NEW YORK, NEW YORK

and deposited the said envelope in a post office box regularly maintained by the United States Government in the City of New York.

Sworn to before me this
10th day of April, 1972

Notary Public

MINUTES OF HEARING BELOW,
JANUARY 17, 1977

elas

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA :

- against - : 72 Cr. 309

LOUIS CIRILLO, :

Defendant. :

- - - - - - - - - - - - - - - - -x

B e f o r e:

HONORABLE EDWARD WEINFELD,

District Judge.

New York, New York
January 17, 1977 - 10:15 a.m.

A p p e a r a n c e s:

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York
BY: RICHARD LAWLOR, Esq., and
JOHN J. KENNY, Esq.
Assistant United States Attorneys

LANNUZZI & IANNUZZI, Esqs.
Attorneys for Defendant
BY: JOHN NICHOLAS IANNUZZI, Esq., of Counsel.

MR. LAWLER: At this time, your Honor, I'd like to hand up the file to the clerk.

THE COURT: The Court will take judicial notice of it. It may be deemed an exhibit in the case.

THE COURT: All right, proceed.

MR. IANNUZZI: If your Honor please, before we proceed further I'd like to indicate for the record my exception to the Court's ruling, and I would assume that the Court would consider my letter an application to have the defendant present, and I have been advised that the Court has indicated --

THE COURT: It is evident to me, and your return call to my clerk makes it clear that there is no evidence of a material nature that the defendant can present on this application. It is evident during your own motion papers and Section 2255 of Title 28 was not intended to give a defendant a free ride to the courthouse. Now proceed.

MR. IANNUZZI: I understand what your Honor says. I just take exception to your ruling.

THE COURT: You have a right to state anything you want on the record, but the defendant is not getting a free ride to the courthouse simply because a motion is being made.

MR. IANNUZZI: As a second order of business may I suggest to the Court that I have subpoenaed various documents and files, etc. I assume that the files that was purportedly missing has been now handed up to the Court. That is one of them. But I have subpoenaed various other documents and logs of the United States Attorney's office and I understand via a telephone call with Mr. Lawler, the assistant in charge of this matter, that in fact there are none such, and I'd like to have that representation for the record at the outset; that is to say, we have subpoenaed mail logs and diaries relative to the actual date of mailing, filing, etc. And Mr. Lawler has indicated that as far as Mr. Seymour, Mr. Viviani and Mr. Rohrer and the United States Attorney's office are concerned there are none such. While I have that by telephone, I would think it would be appropriate to have that on the record.

MR. LAWLER: I would like to respond to that. Going physically through each of the items which Mr. Ianuzzi has subpoenaed, I believe I communicated to him by telephone that Mr. Seymour does have different diaries of the dates in question, that he has searched those diaries and none of them contain any information whatsoever relevant to the motion that is being made by the

defendant in this matter. Mr. Viviani also had a diary which has been found and he has searched that and there is no relevant information contained in that desk diary either, to the defendant's motion.

THE COURT: Where is the reference in the answer to the motion that was made with respect to the information in this case on which the defendant -- to which the defendant has referred?

At the time of the presentation of the information -- you have it in your affidavit.

MR. IANNUZZI: If your Honor is referring to the minutes of the sentencing --

THE COURT: Yes.

MR. IANNUZZI: That would appear, I believe, on page 2 of the sentencing minutes of May 25.

THE COURT: Do you have those? It is in your affidavit, isn't it?

MR. IANNUZZI: And there is a copy of the minutes attached to the motion papers that the Court has before it. There is a full set of minutes attached to the motion papers, sir. And on page --

THE COURT: That is the one where Mr. Seymour states in connection with a copy of the information, I am handing up to your Honor, there is one clerical error in the

docket sheet downstairs that I would like to ask be corrected, I believe it is, nunc pro tunc on the order. The information was in fact filed on April 12. The docket sheet has the date transposed as being April 21, which would make it actually after the commencement of trial and is in error. I would like to ask your Honor to direct that the docket be corrected to show the proper date.

"THE COURT: What date?

"MR. SEYMOUR: April 12 is the actual date of filing and a copy was served on counsel at that time.

"THE COURT: All right. The defendant may be arraigned with respect to the information. Have you served a copy upon Mr. Krieg?

"MR. SEYMOUR: Yes, your Honor.

"MR. KRIEG: Your Honor, I received a copy some time ago."

And then the Court directed that the information be read to the defendant. All right, proceed now.

MR. IANNUZZI: If your Honor please, as an additional order of business, may I ask that any witnesses who will be called in this case be excluded from the courtroom during the proceedings?

MR. LAWLER: The government has no objection.

(The prospective witnesses left the courtroom.)

THE COURT: All right. Proceed. If your Honor please, I believe that Mr. Lawler has covered the aspect of the diaries that have been subpoenaed, but there was additional matter under subpoena to Mr. Fiske, to wit: mail logs, ledgers, books of record of mail logs, ledgers, books or records of whatever type or description containing or made, used and kept for the purpose of recording the dates of mailing of items from the United States Attorney's office which cover and apply or relate to the period of April 1 to April 30, and that would cover the filing or the mailing of this document.

Then I believe that Mr. Lawler has indicated via telephone again that there are none such, and I would just ask that this be made part of the record, if that be the case.

MR. LAWLER: I would just like to respond for the record, your Honor. I did turn over to Mr. Ianuzzi this morning a one-page document that is kept by our criminal clerk's office, which he has not in his possession.

MR. IANNUZZI: I have this, and perhaps this should also be marked. I would ask this: The United States is then representing that this is the only document that they might have available relative to the case. Then I would be satisfied --

elas

THE COURT: Relevant to the issue on this motion.

MR. IANNUZZI: Of course.

MR. LAWLER: The government so represents, your Honor.

MR. IANNUZZI: If your Honor please, I would as an additional order of business ask that the Court take judicial notice, or the United States Attorney perhaps might concede that the trial in this case began on April 17, 1972.

THE COURT: Whatever the record indicates.

MR. IANNUZZI: I would call Mr. Aponte to the stand.

E D D I E A P O N T E, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. IANNUZZI:

MR. IANNUZZI: May I, if your Honor please, look at the Court file which Mr. Lawler has had marked? I haven't had the opportunity to see it today, because it arrived with one of the United States Attorneys.

THE COURT: It is in evidence.

MR. IANNUZZI: Yes. I would just like to take a document out of it so I can refer to it.

(Pause)

BY MR. IANNUZZI:

Q Mr. Aponte, did you bring with you, cause to bring with you this morning the docket sheets relative to this case and other cases from 1 to 500 which had been subpoenaed?

A No, I do not have any docket sheets.

Q None at all?

A No, sir.

Q Do you have the docket sheet of 72 Crim. 309?

A No, I don't have any documents with me.

MR. IANNUZZI: If your Honor please, would it be possible while Mr. Aponte is testifying that someone obtain from the clerk's office or maybe the clerk's office could send up the docket sheets of 72 Crim. 1 through, say, 500.

THE COURT: Did you subpoena those?

MR. IANNUZZI: I certainly did, sir.

THE WITNESS: There is the subpoena, your Honor. There is nothing in there about that.

MR. IANNUZZI: And also criminal docket 72 Crim. 313, which was also subpoenaed.

THE COURT: The witness says you did not subpoena it. I am not going to have an interrupted trial here. I put this down for a hearing so it would be proceeded with expeditiously.

MR. IANNUZZI: Sir, I subpoenaed them. I can't control whether the subpoenas have been dishonored. Mr. Aponte has a personal subpoena with him.

However, Mr. Burkhardt and the clerk's office were intended to return here --

THE COURT: He is not Burkhardt. You question him now. He is on the witness stand.

MR. IANNUZZI: May we have those documents so that I can use them, because I need them for Mr. Aponte. I may not have put them in his personal subpoena, but I subpoenaed them, and I have the subpoenas here for your Honor's edification.

THE COURT: Is Mr. Burkhardt here? Have the documents been produced, do you know?

MR. LAWLER: We did not subpoena Mr. Burkhardt, your Honor. I have a copy of 72 Cr. 309 of the docket sheet, which I have examined and I am confident is an accurate copy. If defense counsel would care to use that copy --

THE COURT: Let your assistant make the

telephoen call to Mr. Burkhardt and ask him why he did not bring them down.

MR. IANNUZZI: I have, if your Honor please, photostatic copies of all the documents that I would require. If your Honor would permit me --

THE COURT: Do you have any objection to his using photostatic copies?

MR. LAWLER: No, your Honor.

THE COURT: All right. Use the photostatic copies.

Q Mr. Aponte, how long have you been a clerk in the United States District Court for the Southern District of New York?

A Twenty-one years.

Q In what capacity are you associated with the clerk's office and what are your responsibilities in the clerk's office?

A Presently I am the orders and appeals clerk. I handle that particular aspect in the clerk's office, dealing with orders and appeals.

Q In your capacity are you familiar with the various methods that are used in the filing of court documents?

A Yes.

Q Is there a procedure to record a specific filing date on a document?

A Yes.

Q Would you describe that procedure for the Court, please.

A We have file stamps and when we receive a document for filing in the clerk's office, it receives the file stamp of the day.

Q In other words, there is a stamp which is used to stamp the date on the document when it arrives, is that correct, sir?

A When it is received in the clerk's office.

Q Is that stamp a hand stamp or a machine stamp, sir?

A It is a machine stamp. There are two types of stamps. You have a rubber stamp and a machine stamp.

Q The oval stamp which bears the date in the center of it and says United States District Court, SDNY, is that a machine or hand stamp?

A That is a hand stamp.

Q Is there one stamp or are there several?

A There are several.

Q I would assume, therefore, that more than one person stamps documents?

A Yes.

Q When a person stamps the document, is there some notation or indication that they give on the document itself so that you would subsequently be able to ascertain who it is that in fact received and stamped the document?

A Each unit in a clerk's office has a stamp and we cut a certain section of that stamp to indicate which unit has filed that particular document.

Q When you say "the unit," I ask you to refer back to 1972. Was the unit system in effect at that time or was there just a criminal clerk and a civil clerk?

A I really don't remember.

Q Very well.

In addition to the stamp which is put onto the various documents as they are handed across the counter, is there any logbook or other record made of the filing -- I am not referring to the document sheet for the moment, I will get to that in a moment -- but other than the docket sheet and the stamped copy, is there any book, log or any other document which records the filing and the stamping of the particular document?

A The opinion book, for one. Any time an opinion is filed from any of our judges, we record that.

Q Other than the opinion book, is there a ledger

book into which, in other words, as someone hands over a document and it is stamped, is it entered into a book, other than being entered on the docket sheets?

A No.

Q Very well.

Who is it that sets the dates on the stamps that are used to stamp the documents?

A Could you be a little more specific?

Q Certainly. In other words, if one were to file a document on April 20, 1972, which was a Tuesday, and the next day somebody begins business on April 21, 1972, who is it who changes the date on the stamps, so it assumes not the 20th, but in fact the 21st?

A We make it a practice the first thing in the morning to look at the file stamp before we stamp anything to make sure it is a correct date.

Q So this would be done each and every day?

A In the morning, right.

Q Is it done by one person or is it done by the person who initially picks up the stamp to stamp the first document?

A That's correct, the one who picks up the stamp to file the certain document.

Q But it is your testimony that it is your practice

to make sure you are stamping the right date on the document?

A Yes.

Q Are you aware of any procedure to correct errors, if in fact there is an error in stamping? Is there a specific procedure that you know of that is in effect or was in effect on April 21, 1972?

A By order of the Court.

Q In other words, if there were an error on a document, someone, for instance, had a wrong date on the stamp, stamped the document, realized that there was an error, you would apply for a court order to change that?

A That should be done.

Q So that would it be your testimony, and would it be fair to state from your testimony that a document which bears an incorrect stamp which would when corrected have some accompanying affidavits and order of the court or so-ordered document attached to it?

A Will you repeat that again?

Q Surely. Would it be fair to indicate from your testimony that if somebody had made an error in stamping a document, that that document, with its incorrect stamp and the corrected stamp on it, would be accompanied by some so-ordered document indicating what the change was and

and why the change was made?

A Yes.

Q When the United States Attorney files documents with the clerk, does he file them in a fashion different than, say, a private attorney representing a defendant?

A No.

Q Is there any special book or log that might be used to record documents filed by the United States Attorney?

A No.

Q Is there any special book or log other than the docket sheet and the hand stamp that would be used to record the filing of second-offender information?

A Not to my knowledge.

Q When the United States Attorney comes -- whether an assistant or a clerk of his office comes and files documents, they hand them over the counter in the same fashion as private attorneys?

A Yes.

Q And they are stamped in the same fashion as they might be?

A Yes.

Q There is also a procedure, if I am not mistaken, sir, that thereafter, after the hand stamp is put on the

document, that it is entered on a docket sheet, is that correct?

A Yes.

Q By the way, sir, when is it that the document is stamped?

A When it is first received in the clerk's office.

Q In other words, would it be your testimony that as that document is handed over the desk in the clerk's office, that it is stamped at that time?

A Well, could you be more specific, sir?

Q Certainly. If somebody comes to file a document with the clerk's office and hands it to the criminal clerk or whoever it is behind the counter to receive it, upon being waited upon in the clerk's office, is it at that time that the document is stamped?

A Yes.

Q And is that for the purpose of recording specifically and for the court purposes when that document was actually received?

A The hand stamp has no date -- rather, has no time on it.

Q I understand. I am not talking about time. I am talking about date. Is that done, that hand stamp

done at that moment that it is handed across so that there is no error as to when in fact it was handed across?

A When it is received, yes.

Q Is it docketed at the same time as it is hand stamped?

A No, not necessarily.

Q However, regardless of that time when it is docketed, whether it be the same day or the next day or whenever, the docketing reflects the stamp date, is that correct?

A Yes.

Q If, for instance, a document were to be docketed approximately nine or ten days after a document was filed, would it bear the date of the filing or would it bear the date on the docketing?

A It would bear the date of the filing.

Q Of the hand stamp?

A Right.

Q In fact, the docket sheet is made up front hand stamped?

A Right.

Q So regardless of any kind of delay in docketing --

A With certain exceptions.

Q When you say there are certain exceptions, would

the exceptions have to do with documents filed in court?

A Yes, or judgments.

Q For the moment I am talking about a second-offender information. Even if it were docketed ten days after it were filed, the day of docketing would be insignificant as to what would appear on the docket sheet, is that correct?

A That's correct.

Q Other than the actual stamp that appears on the document, is there a way in which you as the clerk could determine the filing date of a document?

A The filing date?

Q Yes. In other words, other than references to that stamp that would be stamped on the document, do you have any other method of ascertaining when that document might have been filed?

A Exceptions would be when documents are received in chambers. Normally chambers would indicate on top when it was received, so that would be on the document itself.

Q So that if you were to have, for instance, is there not a method where if a paper is presented to A, a judge, or B, the clerk in the part and he receives it and accepts it, that he would stamp it and say "received in court"?

A Yes.

Q This might bear a different date than the stamp date downstairs, is that correct?

A Yes, it would.

Q But then both dates would appear on the document, is that correct? The date received in court --

A Yes.

Q -- and the date received in the clerk's office?

A Yes.

Q If you were to have a document that had only one date stamped on it and not anything saying "received in chambers" or "received in court," would you be able from that document to know, other than that stamp, when that document was received?

A On the basis of the file stamp.

Q Yes. Other than that, there would be nothing?

A Other than that.

Q Could you, sir, from looking at a document -- and I am referring so that we don't get into judgments or particularly unusual document, but a second-offender information -- from the stamp could you determine if the document was in fact filed on one day, but not date stamped for ten days?

A I couldn't answer that.

Q Is it fair to state, sir, that the stamp is the cnly way of determining the date of filing?

A Yes.

Q Have you testified in court on other occasions?

A I have.

Q Can you testified in court relative to documents on file in the court?

A Not that I can remember.

Q Do you rely on the stamp as contained on your papers in order to know specifically the date of filing?

A Yes, sir.

Q And what date the stamp indicates is the date of filing?

A That is correct.

Q In addition, sir, there is a system for docketing, is that correct?

A Yes.

Q And we have spoken about that, the dockets are made up from the stamped document, correct?

A Yes.

Q Would it be fair to state that after a certain number of documents are received on whatever day, that a clerk or a deputy clerk or whatever the specific title of the job might be, would sit down, bring the docket sheets

over and then start entering those documents onto the docket sheets or the respective docket sheets?

A Yes.

Q Would it be fair to suggest that the person who does this typing onto the docket sheet might accumulate five or ten documents and then sit down to type them onto the docket sheet?

A Yes.

Q Does the same person who stamps them docket them?

A Not necessarily.

Q What would be the usual practice? Would it be more that the attorney who stamps them dockets them, or would it be the exception that the person who stamps them dockets them, or would it be no particular?

A No particular. We have so many employees.

Q Is there any way from the docket sheet itself to determine who in fact typed the docket sheet?

A By collecting the document by the file stamp there would be somebody else's initial to indicate it was entered by that person.

Q In other words, the date stamp would have an indication as to who actually docketed that item?

A That is correct.

MR. IANNUZZI: May I know, if your Honor please, is this Government's Exhibit 1, the file and the exhibits contained therein?

THE COURT: Is that the first one?

THE CLERK: Yes, your Honor.

THE COURT: It may be referred to as Government's Exhibit 1.

(Government's Exhibit 1 marked for identification.)

Q I show you this document, sir, and ask you to look at it. The document that I showed you, what is that, sir? What does it purport to be?

A An information.

Q Is that filed in reference to 72 Crim. 309?

A Yes, it is.

Q Does that purport to be a second-offender information, if you know?

A Yes.

Q What day was that document filed?

A April 21, 1972.

Q Is there anything contained on that document to indicate that that document was filed on a day other than April 21, 1972?

A No.

Q Are there any affidavits, records, logs, court orders or anything else that would indicate to you that the date contained on that document, April 21, 1972, is not the correct date of filing?

A No.

Q Is there anything unusual about that document or the date stamp on it that would indicate to you that it was not filed on April 21, 1972, as the stamp purports?

A Normally these second-offender informations are endorsed on the back by the courtroom deputy. This one is not. That is what is rather unusual about this document.

Q Anything else, sir?

A No.

THE COURT: Is there anything endorsed on the back?

THE WITNESS: No, your Honor. Normally, as I recall from my days being a courtroom deputy, would indicate the day when the defendant admitted being a previous offender.

Q And Mr. Aponte, when you indicate that in your days as a courtroom deputy that would be done, and if this document were so received directly in the clerk's office and didn't go through the courtroom, then it wouldn't have

a court endorsement on it, is that correct?

A I don't know what happened, sir.

Q I am suggesting that supposing this document were not brought to a courtroom where there would be a deputy clerk or a court clerk to endorse it, but was brought directly down to, perhaps it was on the sixth floor in those days or the fourth floor, and handed across the counter and filed, there would be no endorsement, is that correct?

A That is possible.

Q Is there anything that indicates to you on that document that that document was in fact first brought to a court as opposed to the clerk's office?

A No.

Q And in the absence of that would it be fair to suggest to you, sir, that as a result of your experience in that, in fact that document did not go to court?

A Not on the basis of looking at it, no.

Q Other than that, is there anything that indicates that that document was not filed in the clerk's office on April 21, 1972?

A No.

Q By the way, sir, I think I asked this, but is there anything that indicates thereon that that document was

received in chambers or in the courtroom by the deputy clerk at any time prior to April 21, 1972?

A No, there is no other indication.

Q And, sir, did you or anyone you know in the clerk's office advise the United States Attorney that in fact the document that is before you as part of Exhibit 1 was not in fact filed on April 21, 1972?

A Would you repeat that, please?

Q Certainly. Did you or anyone that you know of in the employ of the clerk at the time, April 21, 1972, advise the United Staes Attorney that in fact the date stamp on the document was erroneous?

A No.

Q And if that had been done, would there in fact be an affidavit or a court order or something to that effect accompanying the document, as far as you know?

A Yes.

Q And the absence of that would indicate that none such was done?

A Apparently not.

Q By the way, sir, next to this date stamp, April 21, 1972, is an initial to the left in the upper quadrant. Whose initial is that, sir?

A I do not know.

Q Do you see the initial I refer to, sir?

A I do see the initial.

MR. IANUZZI: May I look at the document for a moment?

(Pause)

Q It's your testimony you do not recognize that?

A No, sir.

Q In any event, that would be the person who docketed the --

A Yes, sir --

Q -- the entry or would have made the entry on the docket sheet as to the date stamp?

A Yes.

MR. IANNUZZI: May I have this marked as Defendant Petitioner's Exhibit A for identification.

(Defendant's Exhibit A marked for identification.)

Q Mr. Aponte, I show you this document, Defendant's Exhibit A for identification, and ask you if you recognize what that purports to be.

A Yes.

Q Does that purport to be the docket sheet in case number 72 Cri. 309?

A A copy thereof.

Q Yes. Is there, sir, in fact an entry on that docket sheet on April 21, 1972?

A Yes.

Q Sir, does that docket sheet that you have in your hands appear to be a fair and reasonable copy of the docket sheet, fair and accurate copy of the docket sheet that would appear in the clerk's office?

A Yes, sir.

MR. IANNUZZI: I offer that in evidence, if your Honor please.

MR. LAWLER: No objection.

(Defendant's Exhibit A received in evidence.)

Q Mr. Aponte, what date is it that appears that the second felony information, or as referred to on the docket sheet as second information of offender, what date does it appear that that document was filed?

A April 21, 1972.

Q That docket entry accurately reflects the date stamp which appears on the actual document itself, isn't that correct?

A Yes, sir.

Q Is there any indication, sir, that that document incorrectly reflects the date stamp contained on the second-offender information?

A No, sir.

Q I draw your attention, or I direct your attention in any event to that entry which says 4/21/72, Louis Cirillo, filed - second information of offender, with a correction made on the second letter of offender, and there are two lines below that, there is an X'd out line and two lines below that there is an X'd out line, each of them bearing a word after it saying "error."

Do you know what is contained beneath the X'd out portions?

A It would appear to be similar entries to the filing of the second-offender for other defendants.

Q Would you be able to ascertain from looking at that -- you have indicated that the second information of offender as appears in reference to Cirillo and not crossed out would be able to determine the names of the defendants, from looking at that document?

A I am having difficulty making out the names, sir.

Q Very well, sir. Would your Honor bear with me a moment so I can locate this document, please?

(Pause)

Q Do you perceive, sir, any basis whatever on either the docket sheet or the second-offender information

to suggest that the date stamp on the docket entry is incorrect as to the date of filing of the second-offender information?

A No, sir.

Q Are you able to testify in fact that that document appears as it purports to appear, to have been filed on April 21, 1972?

A Yes.

Q Now, sir, on the docket sheet itself, 72 Crim. 309, somewhat below the entry of 4/21/72 there seems to be some dates that are chronologically out of order, and they bear an asterisk next to them. Do you see that, sir?

A Yes.

Q Would it be fair to suggest, sir, that those entries are something that would be entered from the deputy clerk minutes books from the trial part brought down to the clerk's office at some time subsequent and entered at the docket sheet when they were brought down by the deputy clerk from the trial part?

A That is correct.

Q Would the asterisk that appears next to the entry 4/4/72 signify that in fact the clerk's office was aware that these documents were being filed out of sequence?

A That's correct.

Q However, regardless of the order on which the documents were docketed on the docket sheet, the docket sheet accurately reflects the dates from other sources, whether they be the hand stamp of the trial minute book?

A Yes.

Q And would it ordinarily be, sir, that documents would appear in chronological order as they are received in the clerk's office and docketed?

A Yes, sir.

Q And that on occasion when a document is out of order there would be some significant asterisk or something to that effect?

A Yes.

Q Would it be correct that the document -- as it is referred to, the information of second offender -- appeared on April 21, 1972, in the order that it appears, in any fashion help you to ascertain that in fact the filing was chronologically dated, stamped and docketed on April 21?

A There is no question that it was file stamped and docketed correctly.

Q Thank you, sir.

MR. IANNUZZI: I ask that these documents be marked Defendant's Exhibits B, C and D for identification.

(Defendant's Exhibits B, C and D marked for identification.)

MR. IANNUZZI: I have one further, if this could be marked E.

(Defendant's Exhibit E marked for identification.)

Q Mr. Aponte, I ask you to look at Defendant's Exhibits B, C, D and E for identification and ask you if you recognize what those documents purport to be.

A These are all copies of docket sheets in the clerk's office.

Q What case numbers do they appear to be the docket sheets of?

A In order, B is 72 Crim. 310, C is 72 Crim.311, D is 72 Crim. 312, and E is 72 Crim 313.

Q And each of those documents, sir, do they appear to be fair and accurate representations, photocopies of the docket sheets which would appear in the clerk's office?

A Yes.

MR. IANNUZZI: I offer those in evidence, if your Honor please.

MR. LAWLER: No objection.

(Defendant's Exhibits B, C, D and E received in evidence.)

Q Mr. Aponte, do you have those documents before you?

A Yes.

Q Was the procedure in the clerk's office that all of these docket sheets would be loose but in numerical order on some sort of a cart?

A Yes.

Q Would they be removed, have an entry made thereon and put back in numerical order?

A Yes.

Q Looking at Defendant's Exhibits B, C, D and E, sir, after 72 Crim. 309 on April 21, 1972, what was the next docket sheet on which any docket entry was made on that date, if you can tell from those exhibits?

A No.

Q Would you look at Exhibit E, please.

A 313?

Q Yes, sir.

A Yes.

Q Is there an entry on April 21?

A Yes.

Q Is there an April 21 entry on Exhibit B?

A No.

Q Is there an entry on Exhibit C for April 21?

A No.

Q Is there an Exhibit D April 21 entry?

A No.

Q There is, however, an April 21 entry on Exhibit E, is that correct?

A Yes.

Q That would be 72 Crim. 313, would it?

A Yes.

Q Would that be the case of United States v. various defendants, including one Victor Paneca and Albert Piero?

A Yes.

Q On April 21, 1972, sir, what is the entry on the docket sheet?

A 4/2/72, Victor Paneca filed second information of offender, followed by a similar entry for Albert Piero.

Q In other words, is it fair that in fact the next docket sheet which received any notation on April 2? Chronological order after 309 was 313.

A It would appear to be, sir.

MR. LAWLER: Objection, your Honor.

THE COURT: Sustained as to form. You keep on asking the witness, is it fair to say. It isn't a question of what's fair to say. It is a question of what

the fact is.

Q Very well. Is it a fact, sir, that the first entry made after the 72 Crim. 309 on April 21 is on 72 Crim. 313?

MR. LAWLER: Objection, your Honor.

THE COURT: Would you know what the first entry would be?

THE WITNESS: No, sir.

Q In numerical order, sir, which is the first docket sheet after 309 which bears an April 21, 1972 docket entry?

A Counsel, you can't tell by this. An entry could have been made on 72 Crim. 313 prior to one being made in 70 Crim. 309.

Q I understand what your suggestion is. What I am asking you is, in numerical order after 309, you have 310 there is no entry, correct?

A Yes.

Q 311 there is no entry?

A Yes.

Q 312 there is no entry?

A Yes.

Q On 313 there is in fact an entry of two second-offender informations dated, or at least docketed

on the docket sheet as April 21, the same date as in the Cirillo 72 Crim. 309, correct?

A Yes.

MR. IANNELLI: I'd like, if your Honor please, to have these documents marked Exhibits F and G.

*** (Defendant's Exhibits F and G marked for identification.)

Q Mr. Aponte, would you look at those documents and do you recognize what those documents purport to be?

A Yes.

Q What, sir, is it that they purport to be?

A These appear to be second-offender informations for defendants Victor Paneca and Albert Piero.

Q What date stamp appears on those documents as filed in the clerk's office?

A April 21, 1972.

Q On those documents is there an initial next to the date stamp to indicate who it is that docketed those documents?

A Yes.

Q Is that the same initial that appears on the second-offender information in 72 Crim. 309?

A It appears to be.

Q Very well. Does that indicate to you that that

person docketed the three second-offender informations that are date-stamped April 21, 1972?

A Yes, sir.

Q Do those documents, that is to say, Exhibit F and G, appear to be fair and accurate representations of the documents that are on file in the clerk's office?

A Yes, sir.

MR. IANNUZZI: I offer them in evidence, if it please the Court, together with their affidavits of service that are attached to them.

MR. LAWLER: May I see them?

(Pause)

MR. LAWLER: No objection.

(Defendant's Exhibits F and G received in evidence.)

Q Mr. Aponte, would you look at those documents, F and G, and also at Defendant's Exhibit A and E. You now have before you the docket sheet in 72 Crim. 309, the docket sheet in 72 Crim. 313, and the second-offender information filed, purportedly filed, against Louis Cirillo, that which bears the date stamp April 21, and the second-offender information filed in 72 Crim. 313, one against Victor Paneca and Louis P[illegible]co.

A Yes.

A Do all the second-offender sheets have the same date stamp, April 21, 1972?

A Yes.

Q Do the docket sheets in 72 Crim. 309 and 73 Crim. 313 bear accurately the fact that those documents were filed in the clerk's office on April 21, 1972?

A Yes.

Q Is there any indication that the date stamp on the Victor Paneca docket, second-offender information, is correct?

A Well, there is an endorsement on the back about the defendant admitting he is the same person in the second-offender information.

Q I understand that. But I am asking you, sir, whether or not -- other than the fact that there is something written on the back in reference to the defendant's admission, is there any indication on that that that document was not filed on April 21, 1972?

A No.

Q Is there any indication that the Albert Piero second-offender information was not filed on April 21, 1972?

A No.

Q Is there any affidavit, logs, records, stamp,

court order or any indication whatever that any of those documents were not filed on April 21, 1972?

A No.

Q Is there any indication that the stamp of April 21, 1972, on the Cirillo document is different than the -- that is the Cirillo second-offender information -- is different from the Paneca second-offender information or the Piero second-offender information in any respect whatever?

A There does not appear to be.

Q Is there an affidavit of service attached to the second-offender information in Paneca and Piero; that is to say, F and G?

A Yes.

Q What is the date of alleged service of that document or those documents?

A April 17, 1972.

Q I direct your attention again to Exhibit E and ask you to look at thise -- I am sorry, I meant to say Exhibit A, that is to say, the docket sheets in 72 Crim. 309, and ask you to look at those crossed-out portions again.

Now, would you be able to determine and discern that in fact under the crossings out on the Cirillo

docket sheet is entered the words "Victor Paneca filed second information of offender,"as appears on Exhibit E, the docket sheet for 72 Crim. 313, and the second X'ing out on the docket sheet in the Cirillo case says "Albert Piero filed second information of offender," exactly as it appears on Exhibit E, the Paneca and Piero docket sheets?

A Yes.

Q So that that appears to be what was actually crossed out from the 309 docket sheet, correct?

A Yes, sir.

Q And reentered correctly on the Paneca, Piero docket sheet?

A Yes.

Q And on the Cirillo docket sheet, is there anything that indicates on April 21, '72, Louis Cirillo filed second information of offender as it appears there, that in fact the date that the X'ing out was put in was different than April 21, 1972?

A No.

Q Does it appear to be in fact that it was done on the same date?

A Yes.

Q As a matter of fact, sir, in looking at both Exhibit A and Exhibit E, that is to say, the criminal

docket sheet 72 Crim. 309 and 72 Crim 313, do you have in fact the same phrase used, "second information of offender"?

A Yes.

Q Do you have the same misspelling that appears on each of the docket sh-ets, to wit: "offender" spelled "o-r-f-e-n-d-e-r"?

A Yes.

Q Does that indicate to you, sir, from looking at all the documents before you, Government's Exhibit 1, Defendant's Exhibit A, Defendant's Exhibits E, F and G, that in fact those entries on the docket sheet were made by the same person and that they were made by the same person on the same day?

A I would assume so.

MR. IANNUZZI: May I have a moment?

THE COURT: There has been constant interruption with co-counsel. If you are not ready to proceed, say so.

MR. IANNUZZI: I am quite ready to proceed, sir.

THE COURT: Then go ahead. If you have other questions to put to this witness, please put them.

MR. UANNUZZI: Yes, sir. I would like to have this marked, if your Honor please.

(Defendant's Exhibit H marked for identification.)

MR. IANNUZZI: And I, if your Honor please.

(Defendant's Exhibit I marked for identification.)

Q I ask you, Mr. Aponte, to look at Defendant's Exhibit F and I and ask you if you can recognize those to be in fact blow-up portions of the pertinent portion of 72 Crim. 309 docket sheet.

A Yes.

Q Is there anything that appears to be different, changed or other than accurate and fair representations of the docket sheets on those, except for the fact that they are blown up substantially?

A The dates are not complete on the last four entries on these cards.

Q Other than that, sir, whatever appears there, does it appear to be a fair and accurate representation of what is contained on Exhibit A?

A Yes.

Q I ask you to look at I and see if there is an elimination of the X's, or at least substantial elimination of the X's that appear on 72 Crim. 309 so as to clearly indicate to you that in fact it says "Victor Paneca filed second-offender information"?

A Yes.

Q And Albert Piero?

A Yes.

Q Do H and I fairly reflect that which is contained on the docket sheet?

A Yes.

MR. IANNUZZI: I offer them in evidence.

MR. LAWLER: We have no objection. We concede that that is what is on the docket sheets.

*** (Defendant's Exhibits H and I received in evidence.)

MR. IANNUZZI: No further questions of this witness at this time, sir.

CROSS-EXAMINATION

BY MR. LAWLER:

Q Mr. Aponte, is it not true that you were not assigned to the criminal docket section in 1972?

A No.

Q You were not assigned to the criminal docket section?

A I was not assigned to the criminal.

Q So that your testimony here today is just to the procedures that you believe were employed in that office in 1972?

A Yes.

THE COURT: You have no personal knowledge of

any of those entries?

THE WITNESS: No, sir.

Q I just want to review a couple of aspects of your testimony. You have testified that the date stamp which is used in the clerk's office was changed by hand each day, is that correct?

A That is correct.

Q It wasn't done automatically, the person had to pick up the stamp and make the change themselves?

A Yes.

Q Is it also true that when looking at that hand stamp to see if the change has been made, one is looking at it in reverse order, looking at the numbers in reverse order?

A Yes.

Q Is it also true, Mr. Aponte, that the docket sheet does not reflect the date the documents are actually, eventually filed with the court in certain cases?

A Yes.

Q Pardon me?

A Yes.

Q So that documents could be filed long prior to the time that is stamped on the file on the docket sheet?

MR. IANNUZZI: Objection to form.

THE COURT: I will let him answer in terms of his experience.

A There may be instances when you get documents where you don't get to stamp them immediately, but it is the practice to file stamp them as soon as you get them.

Q But if documents are filed in chambers or court, the docket entry would not necessarily reflect the date on which the document was filed?

A That is correct.

Q Referring to Defendant's Exhibit E and F, which are the second-offender informations in the Piero --

A D and F.

Q Excuse me. Defendant's Exhibits F and G, which is the second-offender informations in the Piero and Paneca matters. Did you testify that they are endorsed on the back?

A Yes, they are.

Q Did you also testify that Government's Exhibit 1, the second-offender inf ormation in the Cirillo matter, is not endorsed on the back?

A It is not endorsed.

Q I believe you also testified that it was the normal practice to have these endorsed on the back, so that

the second-offender information in the Cirillo matter is abnormal at least in that respect?

A That is correct.

Q The affidavit of mailing, I would like you to refer to that, in Government's Exhibit 1, which is the Louis Cirillo second-offender information. When was that affidavit of mailing prepared?

A April 10, 1972.

Q Was it prepared by assistant United States Attorney --

MR. IANNUZZI: Objection to form.

THE COURT: It speaks for itself, does it not?

MR. LAWLER: Yes, your Honor.

THE COURT: Is that attached to the second-offender information?

THE WITNESS: Yes, your Honor, right on the back.

THE COURT: I have seen a copy of it.

(Pause)

THE COURT: The second-offender information in the instance of the other two named defendants, I think they are Exhibit F and G, there is an indication the mailing was on a different date, is there not, than the date set forth in the case of Cirillo? This is April 10, the others are April 17?

THE WITNESS: Right.

Q The affidavits of mailing in Government's Exhibit 1 and in Defendant's Exhibits F and G are different people. F and G are the same person; and Government's Exhibit 1 in the Cirillo case was prepared by Dean Rohrer?

A Yes.

Q Going to the date stamps, is it not true that there were a number of U. S. District Court stamps that were issued by the criminal clerk's office?

A Yes.

Q Do you have any idea as to approximately how many such stamps were in existence in April of 1972?

A No, sir.

Q Would you estimate that it was over ten?

A No.

Q Is it true that there was a procedure whereby a log was kept of the date stamps that were issued to the individuals?

A I believe the clerk's office does have a log as to how many files stamps are issued, and to whom.

Q So if that log were available that would indicate who had stamped the particular document here in question?

A I assume so.

THE COURT: Can we go ahead? I am having the same problem with the prosecution as I am having with the defense.

MR. LAWLER: I would like this marked Government's Exhibit 2.

(Government's Exhibit 2 marked for identification.)

MR. LAWLER: I would like this marked Government's Exhibit 3 for identification.

(Government's Exhibit 3 marked for identification.)

Q Showing you Government's Exhibit 3 for identification, could you identify that document, please?

A Defendant's Exhibit suyplemental requests to charge.

Q What date is that reflected on the docket sheet as having been filed?

A August 8, 1972.

Q That is also the date that is reflected on the document itself as the date it was filed?

A Yes.

THE COURT: That is long after the trial, wasn't it?

MR. LAWLER: Yes, your Honor.

THE COURT: There are a series of entried made long after the trial. I think it fair to assume that the Court has familiarity with motion papers submitted in this matter and included in the motion papers are the docket sheets. You have a series of entries that are obviously out of order on the docket sheet.

For example, one on August 8, 1972, government's supplemental bill of particulars, August 8, 1972, filed government's memorandum of law preliminary statement. August 8, 1972, filed defendant's requests to charge. August 8, 1972, filed defendant's supplemental requests to charge. August 8, 1972, filed government's supplemental requests to charge.

This is long after the trial. There are obvious errors here. Why do you spend time on it?

Q Mr. Aponte, when corrections are made in official records of the court, if you have knowledge of those corrections, I assume that the criminal clerk's office would make the corrections.

A An obvious mistake, yes.

THE COURT: What explanation would you have for those entries I just referred to, made long after the trial, and obviously having incorrect dates?

THE WITNESS: Well, your Honor, it would seem that these documents were received after the trial, and that is why they were entered at that time in our office.

Q It is clear, is it not, Mr. Aponte, that errors do occur in the criminal clerk's office?

A Yes --

MR. IANNUZZI: Objection.

THE COURT: I don't need this witness to testify to that. The Court will take judicial notice of it, in terms of its own experience, and even go beyond it to say that papers frequently can't be located, they are lost.

MR. LAWLER: May I ask one question in that regard?

THE COURT: Yes.

Q At the present time or at least as of approximately one week ago, is it not true that the documents in your office reflected that the file in the Louis Cirillo case was up in the Court of Appeals?

A Yes.

THE COURT: Any other questions?

MR. LAWLER: I have no further questions, your Honor.

MR. IANNUZZI: May I have a moment?

THE COURT: I wish you lawyers would proceed

expeditionsly here, and I am referring to government and defense.

REDIRECT EXAMINATION

BY MR. IANNUZZI:

Q You are sufficiently familiar with the procedures in the clerk's office to be able to determine from perusing a document what the file stamp is and what the date of the purported filing is, aren't you?

A Yes.

Q And regardless of the fact whether you were in the criminal section or the civil section or whether you were in just a supervisory capacity, you can look at a document and ascertain when it was filed, according to the document, aren't you?

A Yes.

THE COURT: You are only testifying on the basis of the dates that you have observed; you have no personal knowledge of these matters?

THE WITNESS: That's correct.

Q When somebody uses the stamp, as the United States Attorney suggested, that it is in reverse, do they actually stamp a sample to see that the date is correct?

MR. IANNUZZI: Objection, your Honor.

THE COURT: I will let him answer. Let's move

along. Stop all the conversations with both sides.

Q And in reference to endorsements on the back of the Exhibits F and G, when you say there are endorsements on the back of those, those are endorsements that took place two months thereafter by the Court when the man was sentenced, is that correct?

A June 20, yes, they were sentenced on June 20, and that corresponds with the date of sentencing.

Q Those dates and those endorsements on the back of those documents have absolutely nothing whatever to do with the filing date, do they?

A No.

Q And on the documents F and G, which are second-offender information, is there any indication whatever that those documents were in fact received in court or in chambers at any other time other than April 21, when they were received in the clerk's office?

A Yes.

Q They do indicate that?

A No, I am sorry, they do not indicate that.

Q And therefore they are not any more usual than the second-offender information in Cirillo, they are even exactly the same, bearing the same stamps, April 21, no other endorsements, no court endorsements,

no chamber endorsements, nothing else, correct, sir?

A Other than the endorsement on the back.

Q And the endorsement on the back, sir, is something that took place two months after filing?

A Right.

Q Had nothing to do with filing?

A I would have to assume that, counselor.

Q From what you see?

A From what I see, yes.

Q And other than the affidavit of service in connection with Exhibit 1, which says mail affidavit of service, April 10, is there anything to indicate that that document was filed at any time, filed, not served, at any time prior to April 21, 1972?

A No, sir.

Q And regardless of how many stamps are in the clerk's office, do those documents, that is to say, Exhibit 1, Exhibit F and Exhibit G, have one stamp on it dated April 21, 1972?

THE COURT: That is repetitious. End the redirect examination. Answer the question. You are arguing now with the witness. You make the argument to the Court.

MR. IANNUZZI: Very well, sir.

Q In reference to the docket entries which say August 8 and many documents, and there is reference to Defendant's Exhibit A, many documents marked 8/8/72 filed long after the trial, are those not, sir, in your experience -- and you were a deputy clerk in the trial part -- are those not documents that in fact were turned in to the Court and subsequently were turned over to the clerk's office?

A Yes, for filing.

Q And isn't that the reason, sir, that they bear the date August 8, 1972, because they were in fact in the courtroom?

A It would appear to be so.

Q And when they were brought down on August 8, 1972, they were entered, correct?

A On that day, yes.

Q Is there any indication that there is any actual paper filed with the clerk, not filed in court or with chambers, that is out of chronological order on this docket sheet?

MR. LAWLER: OK, your Honor, because you can't tell what documents were identified in court.

THE COURT: If the witness can answer. Let's move along, Mr. Witness.

A I don't have the docket sheet that you are

talking about.

Q It would be 1, sir -- I am sorry, Exhibit A.

A It appears to be in chronological order.

Q Yes, sir. Other than those entries that might have come down from court or from chambers, correct?

A Right.

Q Now, sir, is there anything whatever on the Cirillo second-offender information that indicates that it was filed in court prior to April 21, 1972?

A No, sir.

Q Is there anything on that information that indicates that it was filed in chambers prior to April 21, 1972?

A No, sir.

Q Is there anything whatever on it, that is to say, the second-offender information Exhibit 1 or the second-offender infromations in Paneca and Piero that indicate that any of them were ever filed at any other time, other than April 21, 1972, the exact date that appears on the stamp?

A No, sir.

MR. IANNUZZI: No further questions.

THE COURT: Do you have any questions?

MR. LAWLER: Just one question.

RECROSS-EXAMINATION

BY MR. LAWLER:

Q Can you tell us from looking at the docket sheet whether or not a document has been filed in the courtroom?

A It should indicate if a document is filed in court.

Q What should indicate?

A The document should indicate it as filed in court, for the docket clerk to pick it up so that he can put it on the docket sheet.

Q I show you Government's Exhibit 3 for identification and I ask you if that shows that it was marked in court.

A No.

THE COURT: What is Government's Exhibit 3?

MR. LAWLER: The supplemental requests to charge. At this time I would like to offer it in evidence.

THE COURT: It may be received.

MR. IANNUZZI: May I have this marked for identification.

(Defendant's Exhibit J marked for identification.)

REDIRECT EXAMINATION

BY MR. IANNUZZI:

Q Mr. Aponte, after having looked at -- I am not going to refer to J, sir, after having looked at Exhibit 1 can you say with a reasonable degree of certitude as a result of your experience on what day, regardless of all of the possibilities, what day was that filed in court, sir, according to the court records?

A April 21, 1972.

MR. IANNUZZI: No questions. Thank you.

MR. LAWLER: No questions.

(Witness excused)

(Government's Exhibit 3 received in evidence.)

MR. IANNUZZI: Miss Dorothy Dean.

D O R O T H Y D E A N, called as a witness by the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. IANNUZZI:

Q Miss Dean, what is your employment?

A I am a clerk.

Q In the Federal District of Southern District of New York, in the clerk's office?

A Yes.

Q For how long have you been so employed, ma'am?

A For about six years.

Q Were you in fact working on, if you can recall, were you working in April of 1972 on that job?

A Yes.

Q Were you working specifically, if you can recall, on April 21, 1972?

A I can't specifically recall the exact date.

Q Have you ever testified in cases before?

A No, I haven't.

Q If anything I ask you has a tendency to confuse you or you don't understand it, would you indicate that to me and I will rephrase the question.

A Yes.

Q Are you familiar with the procedures in reference to filing documents in the clerk's office?

A Yes.

Q As a matter of fact, you receive documents that are filed in court every day, don't you?

A Yes.

Q Or every day that you are on the job, right?

A Yes.

Q When you receive them, what is your procedure that you follow when you accept documents?

A The procedure is that we enter them into the

docket sheet, providing the file stamp is on it.

Q When you first receive a document, Mrs. Dean -- is it Miss or Mrs. or Ms.?

A Ms.

Q Ms. Dean, when you receive a document, someone comes in and hands you a document, what do you do to it first?

A First we file stamp it. We check it.

Q You read it over first to find out what it is, do you?

A Usually, yes.

Q And then you file stamp it?

A Not read it over, but just check, you know, the heading.

Q Ms. Dean, I have before you Exhibit 1, A, B, F and G. When you receive a document, is it your practice to always time stamp it upon its receipt, when you receive it first?

A Yes.

Q Would you take the document and leave it in a filing basket for a day or two before you stamped it?

A No, not usually.

THE COURT: Not usually, you say?

Q Do you do that at all?

A Maybe. It depends on the papers that are filed. If it is of great importance, then we try to take care of it right away.

Q How about a second-offender information? Is that of importance that would fall under your category?

A Yes.

Q And being a document of importance, would you date stamp it immediately upon its receipt?

A Yes.

Q Would that be whether it was handed to you by the United States Attorney or by an Assistant United States Attorney or by a clerk from their office, whatever it is?

A Yes.

Q Who sets the date on the date stamp?

A The clerk.

Q For instance --

A That is changed daily.

Q Who changes it? Do you check it, or does somebody else change it?

A Usually there is more than one person in the environment in the clerk's office, and whoever has need of it will change it first.

Q Do you have your own personal stamp, or are there just stamps that are in the office to be used by

whoever gets to the counter first?

A There are steps in the office to be used by whoever gets there first.

Q So that you don't have your own personal stamp that you are responsible for that belongs only to you?

A No.

Q And what would be your procedure in changing the date stamps? Let's say you were working on April 20 and you came in the next day and you were the first one up to the counter, somebody came in, handed you a document. What would you do?

A First check the date stamp.

Q Is there any question about that in your mind?

A About the date stamp?

Q Yes, they would check to make sure you had the right date?

A Usually.

Q Have you made errors in reference to date stamps?

A Yes.

Q What happens when an error is made?

A We correct it.

THE COURT: You correct it if you discover it?

THE WITNESS: Yes, if we discover it.

Q Is there a log book or an affidavit or anything

else that you might make in reference to a wrong date?

A No. If we catch the error, we could correct our file stamp and just mark "error" on the wrong date.

Q Very well. If you see a document that was filed and there is a date stamp and it is not marked "error," not changed, for instance, in front of you there is Exhibit 1. What is the date stamp on that?

A April 21, '72.

Q Is there any crossing out on that date stamp?

A There isn't.

Q Is there anything marked "error" on that date stamp?

A No.

Q By the way, is your initial on that?

A Yes.

Q Does that mean that you stamped that?

A Not necessarily.

Q Does it mean you docketed it?

A Yes.

Q That means you docketed it and marked in the book or on the docket sheet April 21?

A It should be.

Q I ask you to look at Exhibit A, which is right in front of you, and see if you see the docket entry for that

second offender.

A I didn't see it --

Q This docket sheet, ma'am.

(Pause)

Q Do you see it there?

A Yes.

Q Does that docket sheet reflect April 21?

A As far as it is here.

Q Is there anything on either the docket sheet or the information itself that indicates to you that when you handled those documents, when you handle them in April of 1972, that anything whatever is wrong with the file date stamp on that document or the docket sheet that says that it was filed on April 21?

A The possibility could be that it wasn't discovered.

Q Can you see anything on there?

A No.

Q And as you are looking at it, can you say under oath that there is a mistake there?

A Not by looking at it.

Q Do you have any information separate from those documents, that is to say, a diary or a logbook or an affidavit that indicates to you that there is an error there?

A (No response)

Q Do you have anything that suggests to you that that is a mistake?

A The only difference that I see here on the entry, it says "second information." And on the actual information paper that is filed it says "information."

Q Right. But other than that, whatever it says, second information, information, second-offender, other than that, is there anything that you can indicate to this Court of your own knowledge of facts that those dates are wrong?

A No.

Q Did you ever tell a United States Attorney, a member of the United States Attorney's staff, or anyone else, that those dates are wrong?

A No, not as I recall.

Q As far as you know and to the best of your knowledge, did you make a mistake there? As you look at it now, can you swear that you made a mistake?

A No, not now.

Q And, Ms. Dean, in Exhibits G and F, which are there before you, do you see those second-offender informations?

A Yes.

Q Do you see the date stamp on those?

A Yes.

Q Does your initial appear on those?

A Yes.

Q Did you docket those?

A Yes.

Q Do you see the docket sheet in front of you for those, and that would be Exhibit E, and I show you Exhibit E, which is the docket sheet for that criminal docket. What is the date stamp on F and G?

A 4/21/72.

Q Both say April 21?

A Yes.

Q The same as Exhibit 1?

A Yes.

Q Are your initials next to those stamps on F and G?

A Yes.

Q Did you docket those?

A Yes.

Q Do you know whether that could indicate to you whether you stamped them?

A No, I couldn't recall whether I stamped them or not.

Q On the docket sheet E that is in front of you, did you put down an entry for that, the second-offender information?

A Did I put down the information for it?

Q Yes, did you enter those two documents? In other words, did you enter F and G on the docket sheet, and here are your informations. Did you enter that?

I believe it appears on the first page.

Q Yes, there are two.

Q There are two?

A Yes.

Q What is the date?

A April 21, '72.

Q And as you sit there now, with your experience in the clerk's office, when is it that those documents were filed and docketed?

A Would you repeat your question?

Q What date were those documents filed and docketed?

MR. LAWLER: Objection, your Honor. She has no personal memory of that time.

Q According to your usual customs and procedures in the clerk's office, when you take something and put your initials on it and mark something in the docket sheet,

as you look on the docket sheet and the documents where your initials appear, what date were those documents filed?

A The date that is file stamped.

Q Which is that, ma'am?

A 4/21/72.

Q Is there anything on those documents or any of the papers in front of you that indicate that there was a mistake made?

A Seemingly that two papers of the same thing were filed.

Q There are two different defendants, if you notice the caption. As you look at all of those documents, if someone were to ask you to swear to God, what day were those documents filed, would you please tell the Court what day those documents were filed?

MR. LAWLER: Objection to form.

THE COURT: Sustained as to form.

Q What day, according to your experience, were those documents and all of them filed, ma'am?

A Well, accord-ng to the date here, it was filed 4/21/72.

Q Do you have any information whatever that that is a mistake?

A I couldn't recall that far back.

Q I am asking you now, as you sit here now, can you tell this judge that there is a mistake on any of those papers?

A I can't recall.

MR. IANNUZZI: I have no further questions.

CROSS-EXAMINATION

BY MR. LAWLER:

Q Miss Dean, in April of 1972 you had only been on the job in the criminal clerk's office a short while, in fact, you were a trainee in the criminal clerk's office, weren't you?

A Correct.

Q You are familiar, however, now, with the workings of the criminal clerk's office, with the procedures in the criminal clerk's office? Are you familiar with the procedures generally?

A Very vaguely, because during this period of time was the only time that I have ever done any criminal work, and during that period of time I was in training.

Q I want to review with you the procedure as you remember it that was followed in April of 1972 in the criminal clerk's office. Do you remember a woman from the U. S. Attorney's office, her name was Helen Kowalski, she walked with a limp; do you remember her delivering

bundles of documents to be filed in the court clerk's office?

MR. IANNUZZI: Objection to form.

THE COURT: Rephrase it.

Q Do you remember documents being filed from the U. S. Attorney's office?

A Yes.

Q Do you remember documents being brought over by Helen Kowalski from the U. S. Attorney's office? I describe her as the woman who walked with a limp.

A Yes.

Q Would she on occasion bring over bundles of documents to be filed with the criminal clerk's office?

A Yes.

Q Were these documents left in a file box to be later filed and docketed in your office?

MR. IANNUZZI: Objection, if your Honor pleases, as irrelevant. If we are talking about this specific document, I think that would be germane.

THE COURT: Overruled.

A Yes.

THE COURT: What would they do, leave the papers there?

THE WITNESS: Yes.

THE COURT: Where would she leave them?

THE WITNESS: We have a box for filing.

THE COURT: What would be done with those papers that were left there that way?

THE WITNESS: If it was in a central spot at that period of time, someone that was in charge usually distributed the papers to different clerks. They would go through the box and check the papers. There were two of us in the room filing, making docket entry, and they would distribute them.

Q Is it true that certain documents which were brought to the clerk's office were not filed or docketed, but were sent directly to the court or to chambers?

A There have been.

Q So that certain documents would have been received in the clerk's office, but would have been sent on without being filed and docketed?

A Yes.

Q In the normal course of events, were these documents -- these documents were taken from the file box in the office and they were stamped, and they were docketed, is that correct?

A Yes.

THE COURT: Would they always be stamped the

same day they were placed in the file box?

THE WITNESS: Most of the time. Not all the time.

THE COURT: But were there times when they were left in the file box and stamped later on?

THE WITNESS: There were.

Q The person who was doing the stamping of the document was not necessarily the same person who was doing the docketing of the document, is that correct?

A Correct.

Q So that the person who docketed a document would not necessarily know who had stamped it. Would the person who made up the docket cards simply work from a file box and docket each document as it was put in the file box?

A Yes, providing that there wasn't a backlog of work.

THE COURT: You made a reference to a backlog of work. What do you mean by that?

THE WITNESS: If you come in and you file one paper, if a person is not busy, they can get that work done right away, as soon as you bring it in, file stamp it and enter it immediately. But if they are working on several papers that are of importance, then they would have to take

time to enter these various papers in order to get to the ones that are waiting, right?

Q Yes. After the dockets are entered --

THE COURT: What do you mean, after the dockets are entered?

Q Excuse me. After the documents are entered on the docket sheet, they are then sent to the file room for filing or to court, is that correct?

A Most of the time, providing on the document they had various places that we sent them.

Q I refer you to the second-offender information in the Louis Cirillo case, 72 Crim. 309, Exhibit 1. I ask you to note that that is a very thin document, it consists of one page plus a cover sheet, is that correct?

MR. IANNUZZI: Objection.

Q Is it possible that that document could have been attached or have become clipped onto another document and missed entirely as it was going through the file room to be filed and docketed?

MR. IANNUZZI: Objection.

THE COURT: I will allow her to answer in terms of her experience.

A It is possible.

Q If that had happened, if it had been missed,

then it would have been sent on to the file room or to the court, is that correct?

A Correct.

Q Isn't it also correct that if it had been later discovered, either in the course or in the file room, and had been stamped there and sent down to be docketed, the person who was preparing the docket sheets would not necessarily be aware of the fact that it had been misplaced because the person doing the docket sheets would just prepare the docket sheet from the file?

MR. IANNUZZI: I object to the form. Highly speculative. The form is improper.

THE COURT: Overruled.

A Correct.

Q You have testified that your office received a number of stamps from the criminal clerk's office, is that correct, or did you just have one stamp in your office?

A We have more than one stamp, but I don't recall whether we had more than one at that period of time.

Q Do you know if a log was kept of the stamps that were issued by the criminal clerk's office?

A I was told that there was one -- you mean a listing of them, right?

Q A list of the stamps.

A I was told that there was, but now misplaced.

Q That the entire log has been misplaced?

A For that period of time.

Q So for the stamps issued in 1972, that log has either been misplaced or it no longer exists?

A Right.

Q In any case, it is not available?

A No.

Q But if it had been available, we would have been able to tell where the stamp -- who had the stamp that was used to stamp the different documents on file?

A Correct.

MR. LAWLER: No further questions at this time.

REDIRECT EXAMINATION

BY MR. IANNUZZI:

Q Ms. Dean, when you indicate that the documents which might have been brought down in a batch were distributed by the person in charge to two or three different people, was that for the purpose of getting it done fast so that the right file date would be put on all the documents?

A Those were usual procedures at that time.

Q That would be so that you could get the date stamp for the date that it was filed in the office with you? In other words, these papers were not given to one

person, but distributed amongst several people so that it could get the work out and they wouldn't be sitting around in the file basket, right?

A That was to get it out, because there was still work always in the file basket.

Q Yes, ma'am. And it was distributed to different people so as to keep up with it, right?

A Yes.

Q You answered a question, some documents went directly from the clerk's office to court or chambers, is that right?

A Usually to chambers.

Q When it went to chambers, usually at sometime later it would come back, right?

A If it had not been docketed it would return to the docketing room.

Q In other words, if it were sent to chambers and had not been docketed or stamped, chambers would ordinarily send them back to you?

A Yes.

Q How long would that take to bounce them down again?

A That depends.

Q Is there anything on that document to indicate

that it wasn't stamped exactly when it came over the counter?

A There isn't anything to --

Q I am talking about Exhibit 1 now.

MR. LAWLER: Objection, your Honor. That question has been asked and answered.

THE COURT: You asked that question on direct. Let's not go over it.

Q Mr. Lawler asked you whether in unusual cases it was sent directly to chambers, but in the ordinary case it was stamped in the office, correct?

A Yes.

Q Is there anything that appears on the face of Exhibit 1 right in front of you that indicates that that is an unordinary or different document that had different treatment than just being received over the counter and stamped on April 21 when it was filed?

A It is an ordinary document.

Q Is there anything about that document that is unusual, that indicates that something unusual happened to it other than your receiving it or somebody else receiving it and stalling it?

A I can't recall. I didn't have that much knowledge at that period of time whether I had received the

wrong document or not.

Q As you look at it now, is there anything, anything, anything about that document that indicates that it was received on a date different than appeared on the date stamped?

A There is no indication.

Q There is nothing. And is there any indication that that document arrived in a bundle? Can you look at that document and say that is what happened to that document?

A That wouldn't be possible for me to tell.

Q Is it possible to look at that document and say that that went up to chambers?

A No, not just by looking at it.

Q Is there anything on that document that indicates that that document went to court?

A I don't think they would indicate it if it had.

Q Is there anything on that that indicates anything except that your office received it on April 21, 1972, the day it was filed?

A That is according to the file stamp.

Q Anything that --

THE COURT: She has already testified to that. Let's not get so repetitious, please.

MR. IANNUZZI: No further questions.

THE COURT: She has answered that five or six times.

You may step down, please.

Call the next witness.

(Witness excused)

THE COURT: Call the next witness.

MR. IANNUZZI: Whitney North Seymour, Jr.

W H I T N E Y N O R T H S E Y M O U R, J R.,

called as a witness by the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. IANNUZZI:

Q Mr. Seymour, you were the United States Attorney in April of 1972, were you not?

A I was.

Q You were in fact in charge of the prosecution of the case against United States v. Louis Cirillo, 72 Crim. 309, were you not?

A I was.

Q You were the United States Attorney who handled the proceedings at the sentencing on May 25, 1972?

A I was.

Q Have you this morning or at some time prior to your taking the stand had an opportunity to confer with Mr. Lawler and your associates and have you had the opportunity to read the minutes of the sentencing procedure?

A I have had the opportunity and I have done so.

Q You are therefore familiar with that which occurred on May 25 before his Honor?

A I am.

Q In refreshing your recollection as to what occurred on that date, did you represent to the Court at that time, to wit, May 25, 1972, that a clerical error occurred on the docket sheet downstairs which you wish to have corrected nunc pro tunc; the information, according to your representation, was filed on April 12 rather than April 21, and that the date on the docket sheet was transposed; did you indicate that to the Court?

A Yes, I did.

Q Not necessarily in exactly those words, but in sum and substance, is that what you represented to the Court, is that correct?

A That the information had been filed on April 12 and that I believed the number was transposed.

Q Yes, sir. At that time you handed a document

to the Court and you indicated that the docket sheet was incorrect. Had you in fact had the opportunity yourself personally to see the second-offender information?

A The original?

Q Yes, sir.

A I had not. Or, as the transcript shows, I asked the Court if he had it.

Q I direct your attention, sir, to --

THE COURT: Before you go ahead, you asked a question that Mr. Seymour handed the docket sheet to the Court and asked that it be corrected.

MR. IANNUZZI: I will get to that in a moment, sir.

THE WITNESS: I thought he was referring to me handing a copy of the sheet to the clerk.

THE COURT: Read the question or --

Q Did you on that occasion, sir, and if you prefer, I will give you a copy of the minutes --

A No, I don't need it.

Q On that occasion, did you hand a copy of the information to the Court?

A I did.

Q And did you indicate that the docket sheet which was downstairs and I believe a copy of which is before

you as Exhibit A in the event that you wish to refer to that, that the docket sheet downstairs had a transposed date?

A Correct.

Q The copy of the information which you handed up to the judge was not the original that was filed in the clerk's office below, was it?

A It was not. It was a file copy from our office.

Q And the file copy was not stamped, was it?

A The copy handed the Court was not stamped, no.

Q Had you had an opportunity prior to speaking to the Court that morning, had an opportunity to actually see the stamped second-offender information?

A The original filed in the court?

Q Yes.

A No.

Q Were you therefore unaware at the time that you spoke to the Court and you told him that the date was transposed that in fact the original second-offender information had the date stamp April 21, not April 12? Were you aware of that?

A I was now aware of that or I would have asked to have that corrected too.

Q Very well. So therefore, when you made the

statement, you were only aware of the docket sheet?

A Correct.

Q I ask you to look at Exhibit 1, which is before you, it doesn't have an exhibit number on it, but it is this court file. That is the second-offender information already introduced into evidence in this proceeding. You see that that bears the date stamp April 21, 1972?

A I do see that.

Q Had you prior to making your representation to the Court in the morning or whatever time it was on May 25, 1972, had an opportunity to actually see the docket sheet and the transposed date?

A I am not certain whether I saw a Xerox copy of the docket sheet at that time.

Q You may have or you may not.

MR. LAWLER: Objection. He answered the question.

Q In filing the second-offender information, would that have been in fact the responsibility of one of your subordinates at that time?

A One of my assistants, yes.

Q Assistants, yes. In fact, was that how the second-offender information was filed, one of your assistants was in charge of the filing of it?

A That was my understanding.

Q Would it be also factual that you were advised by one of your assistants as to the date of its filing and the date of the docket sheet?

A That is absolutely correct.

Q When you made such a statement, sir, did you have actual knowledge of your own perception that the second-offender information was filed on April 12, or did you rely upon the advice of one of your assistants?

A I relied on the statement of my assistant, which obviously I asked about carefully before making a representation to the Court.

Q Very well.

Do you have, sir, any diaries, logs, records, memoranda, notes, affidavits, that indicate that the second-offender information was in actuality filed on a day other than that which is stamped on it?

A I have brought with me my diaries, calendars and the like. They make no mention of the filing of the information, and it is not the kind of information that would ordinarily appear in there.

Q Would it be a fact that you have no information or fact which you could give to this Court that indicates that that date stamp is incorrect, is that correct?

A You mean direct personal knowledge?

Q Yes, sir.

A The information I have is the information that was contemporaneously given to me by my assistants, who told me that it had been filed timely, that some error had occurred somewhere, and that the docket sheet reflected an incorrect date, and suggested that I raise the matter prior to the sentencing, and I did.

Q And therefore, sir, it is a fact that you have no actual knowledge of when that second-offender information was filed?

A I don't know what you mean by "actual knowledge." I did not file it myself. I do have the knowledge that assistants on whom I place great reliance and whose good faith I don't challenge for a minute stated to me that it had been, and obviously if there was a question we could have had a hearing at that time.

Q Very well. But your entire basis is not based on your own knowledge, is that correct?

A I did not personally file it, no.

Q And you cannot, as yousit here now, indicate to this Court other than what you heard from somebody else, that that document before you bears an incorrect date?

A I have the deep personal conviction that it was

timely filed.

MR. IANNUZZI: Objection, your Honor, as to that.

THE WITNESS: I don't know what your question is.

THE COURT: I will allow him to answer in light of the allegations that are contained in the affidavit on which this motion is based.

MR. IANNUZZI: May the witness answer the question?

THE COURT: Put the question again.

Q Do you have any facts, sir, not your conviction or your belief or your assumption, but facts, that indicate of your own knowledge that the date which appears on Exhibit 1, the second-offender information, which purports to have been filed April 21, 1972, is incorrect?

A My problem is defining what you mean by "fact." Let me try to answer in my way. I do have the fact that there is an affidavit of service that was executed on the 10th of April; I do have the fact that I had a direct statement to me from the person who actually did the filing, which if made under oath in a courtroom would obviously be a fact; that it had in fact been done that way, and I was absolutely satisfied that it had been done that way before I made a representation to the Court, and I am still

satisfied that it was done that way.

Q When you are so satisfied you are relying solely and simply on the statement of someone else?

A Of an officer of the court and an Assistant United States Attorney in whom many responsibilities are placed, yes.

Q As the United States Attorney, and not an Assistant United States Attorney, and as an officer of the court, can you give your own information, not what you heard from somebody else, that that date stamp before you on Exhibit 1 is incorrect? Do you have any information as a factual matter, not what you heard from somebody else, and not what you believe that they told you or not that you believe that they gave you the right information? Anything of your own information that tells you that that date is wrong?

A I am still not sure I understand the question. The facts before me are that the assistant who filed the papers said that he filed it on the 12th day of April. That is what I had to go on that led me to believe that the numbers are wrong; that, combined with the affidavit of service on the 10th of April, fortifies that.

Q In reference to the affidavit of service, you say that is dated April 10. However, pursuant to the

statute, do you have any information of your own knowledge, other than what was told to you, that is to say, you saw the document, you brought the document, you saw the clerk take it -- anything of your own knowledge that you perceived with any of your five senses that you could tell this Court that you know as a fact, not what you heard from somebody else, that this document was filed on other than April 21, 1972, as the document indicates?

MR. LAWLER: Objection, your Honor. That question has been asked and answered.

THE COURT: You weren't present when it was actually filed, were you?

THE WITNESS: I was not, your Honor. But this is a very broad question. If I can try to respond to it, I have since examined the document, the court docket sheet, and I can see on there a number of questionable entries which seem to me -- which at least raise a question to the irregularity with which it was entered.

THE COURT: I have already commented on that. There is no need for you to say anything else about it.

Q Can you comment on the docket sheet, the one in front of you, from which the docket sheet was made up, and can you indicate anything by looking at it right now, and anything in connection with that document that is before

you, examine it as much as you will, can you indicate anything on that document that indicates that it was not filed on the day that it purports to have been filed according to the date stamp?

A From the document itself, no. From the statement of the person who filed it, yes.

MR. IANNUZZI: If your Honor please --

THE COURT: You asked him "Can you comment." Read the start of that question, please.

(Question read)

THE COURT: You may answer it.

A My answer is simply from the physical document itself, I cannot tell you, but from the Assistant United States Attorney who filed the document, I can tell you, I knew then and I know now that it was filed on the 12th of April, 1972.

Q Sir, assuming for a moment that there is no basis whatever for the statement made to you by your assistant, assume for the moment that that be a fact, that there is no basis, any more than you have a basis from looking at the document, can you now indicate to the Court anything of your own private knowledge that would help this Court in knowing that in fact that document was filed on a date other than it purports?

A I don't believe I can, other than my affidavit of service and my familiarity of the practice in the office.

Q Does that document in any fashion indicate on it the date of filing?

A No, but it triggers a filing date.

Q But does it indicate in fact that it was filed on any day other than April 21?

A On the face of the document, I do not see any indication.

Q Is there any document that you have anywhere that indicates April 12 as the date that this document was filed?

A I am not aware of any.

Q Do you know whether or not your assistants at any time showed you a document that indicated in fact the document, other than his statement, is there any physical evidence that you have ever seen that indicated that this document was filed on April 12?

A I don't recollect any.

MR. IANNUZZI: I have no further questions.

MR. LAWLER: No questions.

THE COURT: The Court has a question to ask of the witness.

BY THE COURT:

Q There is an allegation in the affidavit here that "A careful scrutiny of the available official records and documents on file in the clerk's office of this court lead to the inescapable conclusion that at the time of sentence the United States Attorney was aware of the strict requirements for the timely filing of the second-offender information."

I take it that is correct, that you were aware of the requirement?

A Yes, sir.

Q Now, it continues: "that the United States Attorney was further aware that such timely filing had not taken place herein, and that the United States Attorney purposely and intentionally misadvised this Court that the said filing had been timely made, purposely and intentionally misleading this Court to impose an impermissibly enhanced sentence upon the petitioner."

A I categorically deny that, your Honor, and I never made such a representation.

THE COURT: You may step down.

BY MR. IANNUZZI:

Q When you indicate that you did not purposely and intentionally make such a statement, you did, however,

rely solely and completely on the statement and the veracity or lack of veracity thereof of one of your associates or assistants?

A I did not include a consideration of a possible lack of veracity thereof. I relied entirely on what he told me absolutely, as I did every day in the conduct of that office.

Q If there was no basis for his representation to you upon which to rely --

A Then he should not have been an Assistant United States Attorney.

Q Assuming --

THE COURT: You asked him that before. You asked him on direct. Let's not repeat. I think he was entitled to enter whatever answer he had to the allegations made against him.

You may step down.

(Witness excused)

MR. IANNUZZI: Mr. Arthur Viviani.

ARTHUR J. VIVIANI, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. IANNUZZI:

Q Mr. Viviani, you were an Assistant United States Attorney in April of 1972, were you not?

A Yes, I was.

Q And you were assisting Mr. Whitney North Seymour, Jr., in the prosecution of indictment 72 Crim. 309, were you not?

A Yes, I was.

Q At that time what was your position in the office, the United States Attorney's office? Were you in charge of the narcotics bureau, deputy chief, or anything to that effect?

A No.

Q Who was assisting Mr. Seymour in addition to yourself on this 72 Crim. 309?

A Dean Rohrer.

Q So that in control of prosecution would either be Mr. Seymour, yourself ir Mr. Rohrer, is that correct?

A Yes. I would think that Mr. Rohrer and I put the case together and Mr. Seymour untilately tried it.

Q Did you have more authority than Mr. Rohrer in the office or were you co-equals?

A We were co-equals. I had a little more experience

than he did.

Q Were you present in court on May 25, 1972, at the sentencing in 72 Crim. 309?

A Yes, I was.

Q Have you had an opportunity to speak with Mr. Lawlor and your associates concerning the proceedings that day?

A Yes.

Q Have you had an opportunity to familiarize yourself with the minutes of the proceedings?

A I didn't look at the minutes, no. I heard them read, though.

Q So you know what they contain?

A Yes.

Q You did not make any statement in court, but were you there when Mr. Seymour made a representation to the Court that in handing up an unstamped file copy of the second-offender information, he said to the Court at page 2 of the sentencing minutes, "I am handing up to your Honor, there is one clerical error in the docket sheet downstairs that I would like to ask be corrected nunc pro tunc on the order. This information was in fact filed on April 12. The docket sheet has the date transposed as being April 21."

Did you hear that statement being made?

A Yes, I did.

Q At the time of the bringing up of the unstamped file copy of the information, had you personally had an opportunity to see the original file copy in the clerk's office?

A You mean at that time?

Q Yes.

A No, I did not.

Q Or at any time prior to Mr. Seymour addressing the Court on the morning of May 21?

A Mr. Iannuzzi, we talked about that. I just cannot recall anything concerning the filing of that information.

Q Would you have been, sir, in charge of the filing, or would it have been Mr. Rohrer?

A I just don't recall.

Q Were you advised, without the content of any statement, were you advised by a member of the clerk's staff that in fact the document was filed on the 12th of April, although the information bears the date April 21?

A No, I don't recall that I was.

Q You were never advised by the clerk's office?

A No. You mean --

Q In other words --

A The clerk for the court or the clerk for the U. S. Attorney's office?

Q No, the clerk for the court.

A I cannot recall that I was.

Q I ask you to look at the document before you, which is Exhibit 1. It is not marked with an exhibit number, but this is it here.

A I see it.

Q Do you see the date that appears thereon?

A You mean the stamp file?

Q The date stamp.

A Yes.

Q That appears to be 21, 1972, correct.

A It is April 21, 1972.

Q Did you have an opportunity before the sentencing ever to see that document with that stamp or the docket sheet, which is Exhibit A before you, that says that it was filed on April 21?

A I cannot recall that.

Q Do you have a diary or a log or an affidavit or any document which indicates that at that time you were advised or knew in fact that the date that appears on the document, that appears on the docket sheet, is incorrect?

A I do not.

Q Did you ever tell Mr. Whitney North Seymour that the date that appears on the docket sheet, the date that appears on the information, is incorrect?

A I do not recall it at all.

Q As you look at the document now, that is to say, Exhibit 1, and as you look at the docket sheet, which is Exhibit A, can you give this Court of your own knowledge any information that in fact those dates that appear thereon are incorrect?

A You mean April 21?

Q Yes.

A Can you repeat that, please?

Q Can you of your own knowledge of fact that you are aware of, of experience that you have perceived yourself, can you tell the Court that the datescontained on the information, Exhibit 1, or the docket sheet, Exhibit A, are incorrect?

A Mr. Iannuzzi, I tried to recollect with Mr. Seymour and in a conversation with Mr. Rohrer.

The question you have posed, and I have absolutely no recollection of anything concerning the document which is the information or the docket sheets.

Q And I would take it that it is a fact that you

cannot tell this Court of your own knowledge that those date are incorrect?

A I cannot.

MR. IANNUZZI: No further questions.

CROSS-EXAMINATION

BY MR. LAWLOR:

Q Mr. Viviani, is it not a fact that you have gone through the U. S. Attorney's file in this case of United States v. Louis Cirillo?

A I have, Thursday.

Q You have inspected the documents in that file?

A Yes, I have.

Q It is also your testimony that at the present time you do not remember anything about that second-offender information being filed in this case.

A That is absolutely correct. The only thing, as I told you last Thursday, I do remember is that I would normally file documents in my cases in the clerk's office when it used to exist behind 318, by similarly taking the document there and handing it to a clerk or putting it in a box, when Frank Castelano ran that office. I cannot say I took this document regarding that information there. I don't remember.

Q Were you aware in March or April of 1972 of the provisions of 21 USC Section 821, which relates to second-offender informations?

A I was.

Q What was the basis of your knowledge at that time about the requirements for filing the second-offender information?

MR. IANNUZZI: Objection, immaterial.

THE COURT: Overruled.

A That it was totally different from the old law which required the filing of the information prior to sentencing. The new law required the information prior to trial and I believe prior to plea, if there were to be a plea.

THE COURT: You were alert to the importance of the statute?

THE WITNESS: Yes, I was.

Q Do you recall being aware any time after April 17, 1972, either through information that you were given by anyone else in the case or filing the second information, of any information that you had in your possession that that second-offender information had not been filed prior to trial?

A Could you repeat that? Are you saying that did

I know after the 17th that it had not been filed?

Q Are you aware, do you now recall ever being told or finding out that that second-offender information had not been filed prior to trial?

A I have absolutely no recollection concerning the second felony information.

Q In view of the fact that you knew the importance of this case, in view of the fact that you knew the second-offender information had to be filed before trial, is it fair to state that you would now remember if you had been told at that time that the second-offender information had not been filed timely?

A I would have known at the time, absolutely, that it had not been filed because it would have been important to me, it seems to me.

Q Would you remember now having been told that it had not been filed?

A I don't remember, Mr. Lawlor.

Q Is it also true that you have exhausted your memory concerning the filing of the second-offender information?

A I have.

MR. LAWLOR: No further questions.

REDIRECT EXAMINATION

BY MR. IANNUZZI:

Q Mr. Viviani, you indicated that you were aware of the extreme importance as a result of the change in the statute for the filing of the document of a second-offender information prior to trial and prior to plea. Based upon the fact that that was your awareness, did you direct and did you secure specifically the filing of the second-offender information in this case prior to trial?

A I don't remember, Mr. Iannuzzi.

MR. IANNUZZI: No further questions.

THE COURT: You may step down.

Please call your next witness.

MR. IANNUZZI: I have no further witnesses. The petitioner rests.

(Witness excused)

THE COURT: Does the government have any witnesses?

MR. LAWLOR: Yes, your Honor. The government would call Dean Rohrer.

D E A N C. R O H R E R, called as a witness by the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LAWLOR:

Q Mr. Rohrer, how were you employed in 1972?

A I was employed as an Assistant United States Attorney here in the Southern District of New York.

Q When did you join the office, do you remember?

A In mid-1971.

Q Do you remember when you left?

A I believe it was the end of January 1973.

Q Who was the United States Attorney at that time?

A Mr. Seymour.

Q Did you work in the case brought by the government against Louis Cirillo?

A Yes, I did.

Q The one brought in March of 1972?

A Yes, I did.

Q What was your role in that case?

A Mr. Seymour, Mr. Viviani and myself were responsible for the preparation and trial of the case. I worked on both preparation and trial.

Q Did you also work on other cases that were brought by the government against Louis Cirillo?

A Yes, I did.

Q There was an earlier indictment, 71-1195, that

was filed in October of '71. Did you work on that case?

A I worked after the indictment was filed in that one. I worked in the preparation of trial on that indictment.

Q And there was another case, indictment filed January '72, 72 Cr. 4. Did you work on that case?

A Yes, I did.

Q I am going to show you Exhibit 1, the second-offender information, and I ask you if you recognize that document.

A Yes, I do.

Q How can you identify that document?

A I recall having prepared this document and I note from the affidavit of mailing my name and my signature as having mailed it. My initials are also in the upper left-hand corner, indicating that I prepared it.

Q Do you have any specific present recollection of filing the second-offender information?

A I do not.

Q In your work as an Assistant United States Attorney, did you prepare affidavits of mailing for other cases, for other documents?

A Yes, I did.

Q What kind of documents would you prepare in

affidavits of mailing?

A Memoranda of law, affidavits, informations, in some cases; any number of court pleadings and other court-related documents.

Q If you know, could you characterize how many such affidavits?

A I would just have to say many.

Q Did you have a practice or procedure which you followed when you had prepared an affidavit of mailing?

A Yes. After I had mailed a court paper, I undertook promptly to see that whatever the court paper was, was promptly filed with the clerk's office of the court. In some cases with papers dealing with motions, memoranda of law, affidavits, etc., I also personally delivered a copy to the particular judge's chambers so that he would have it available.

Q With regard to the filing of the document, what was your practice and procedure?

A As far as filing was concerned, I would either deliver the particular document to the U. S. Attorney's criminal clerk's office and request them to go ahead and file it, as was the practice, or if I was near room 340, I believe it was room 340, behind room 318, the courthouse criminal clerk's office, I would file the document myself

or deliver it to the clerk's office for filing.

Q Do you have a present recollection of whether you were familiar in March and April of 1972 with 21 USC Section 851 regarding the filing of second-offender informations?

A That is the section dealing with the time of filing and the requirement for filing?

Q Yes.

A Yes, I do have a present recollection of being aware of it as early as February of 1972.

Q What is the basis of your being aware of that?

A In the case of Mr. Cirillo, he having been a prior offender, or having been previously convicted under the narcotics laws, it was necessary for us to file an information if we wanted to have him sentenced as such, and I personally looked at the statute governing this and I was aware that it had to be filed before trial. I prepared a previous information in connection with, I believe it was the 72 Cr. 4 indictment, which is similar, virtually identical to this one you showed me as Exhibit 1.

Q When was that second-offender information in connection with 72 Cr. 4, when was that prepared?

A My best recollection is about late February of 1972.

Q You were at the trial of Louis Cirrillo, you say?

A Yes, I was.

Q You were also at the sentencing?

A Yes, I was.

Q Do you have any recollection now of seeing that second-offender information in your office or at the trial or anywhere else or being told that the second-offender information had not been filed prior to trial?

A If I understand your question directly, you are asking if -- would you please restate it?

Q Yes. Do you have any present recollection of being told in April of 1972 that the second-offender information had not been filed prior to trial?

A I have no recollection of anyone having said that.

Q Do you have any recollection now of finding the second-offender information or coming upon in by yourself and realizing that it had not been filed prior to trial?

A No, I do not.

Q Would you now have such a recollection if that had taken place in April of 1972?

MR. IANNUZZI: Objection to form. Speculative.

THE COURT: I will allow it.

A I would have recalled that event because of my awareness of the rule that it be filed before trial, and I would have been deeply concerned if I discovered during the course of the trial that it had not been filed prior to trial. I would have recalled that.

Q Have you exhausted your recollection about preparation and filing of the second-offender information?

A Ever since you called about a month ago I have thought and thought about the events surrounding the preparation and filing of this, and I am afraid my recollection is as I have stated it to be.

Q Do you recall now telling either Mr. Seymour or Mr. Viviani that the second-offender information was in fact filed on April 12, 1972?

A I have no specific recollection of that. No, I do not.

MR. LAWLOR: I have no further questions.

CROSS-EXAMINATION

BY MR. IANNUZZI:

Q Mr. Rohrer, you indicate that you remember having prepared the second-offender information in this case, 72 Crim. 309, is that correct?

A I recognize it, and I recognize it as a document

which I did prepare, yes.

Q When you recollect preparation, is it independent, or is it merely as a result of seeing the document with your initials on it?

A The document refreshes me about it, Mr. Iannuzzi. I specifically recall looking at the old files, which are summarized in this information, and I recall having prepared this.

Q This trial, 72 Crim. 309, was a rather major trial, was it not?

A I considered it to be so.

Q Did you also testify that this is the only case in which you assisted Mr. Seymour?

A That's right.

Q You indicate that you personally prepared the document, personally read the applicable statute, is that correct?

A That's correct.

Q And you indicate also a deep concern relative to the matter of filing of the second-felony information, that you had a deep concern, you read the statute, and you were very careful in what you aid, is that correct?

A I was aware of the importance of filing it prior to trial.

Q Very well. However, you also testified that you have no independent recollection of personally filing the document.

A That's correct.

Q You are not testifying that you personally took this document to the clerk and filed it on April 12, 1972?

A I have no recollection of filing it or not filing it. I simply have no recollection about the filing of this document.

Q What I am specifically asking you, Mr. Rohrer, is, are you able to testify as a fact that you had filed the document at any time prior to April 21, 1972?

A I am sorry, I have no recollection.

Q Very well, you did indicate that after following your ordinary procedure of mailing, that you followed an additional procedure of promptly either delivering the document to the clerk's office for filing or delivering it personally, correct?

A I have no recollection, but that was my practice. Those were the two ways to see to a document's filing.

Q But you have no recollection of personally filing it, is that correct?

A That's correct.

Q Are you able to state that if in fact you had given it to the clerk's office in the United States Attorney's office, that they in fact timely filed it prior to April 21, 1972?

A I have no way to answer that.

Q Fine. And have you any way of telling this Court that the document that appears before you, and that is the one to your immediate left, which is Exhibit 1, the Court file, has a date stamp on it, April 21, 1972, are you able with your own knowledge to tell this Court that in fact that date is incorrect?

A Today I am not able to do that.

Q Did any clerk, assistant clerk, deputy clerk, anything, tell you in fact there was an error of date or transposition of date in the filing of that document?

A I have no recollection of such a conversation.

Q Did you ever have a conversation with Whitney North Seymour where you advised him prior to May 25, 1972, that in fact there was an error in the filing date as recorded of the document?

A I have no recollection of such a conversation.

Q And do you have any recollection whatever that you personally delivered a copy of this second-offender

information prior to trial to Judge Weinfeld?

A I have no recollection as to delivering it to Judge Weinfeld.

Q Or anybody in his chambers?

A I am sorry, I do not recall having done so.

Q Or the clerk in the trial part?

A Do you mean the criminal clerk?

Q The clerk in the part that would be sitting at the desk before the judge, did you personally deliver it to a particular clerk who was then on duty in whatever part this matter was tried?

A I have no recollection of having done so.

MR. IANNUZZI: I have no further questions.

THE COURT: You may step down --

MR. IANNUZZI: May I ask one further question?

BY MR. IANNUZZI:

Q Do you have any basis right now to advise this Court that in fact the date which appears on Exhibit 1 is incorrect?

A I have no such basis.

MR. IANNUZZI: I have no further questions, sir.

THE COURT: You may step down.

(Witness excused)

MR. LAWLOR: The government calls Helen Kowalski.

H E L E N K O W A L S K I, called as a witness by the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LAWLOR:

Q Would you please state for the Court your occupation.

A I am a legal clerk employed in the criminal clerk's office of the United States Attorney.

Q How long have you been so employed?

A I have been employed in the criminal clerk's office for approximately seventeen years.

Q Where were you employed prior to that?

A Before that I was employed in the records and files section of the United States Attorney's office.

Q In April of 1972 you were in the criminal clerk's office in the U. S. Attorney's office?

A Yes, sir.

Q Could you just briefly describe the physical layout of that office and your position in that office?

A The office was located in the Pearl Street corridor of the courthouse on the fourth floor. It was given the number 450, and --

Q How many people worked in the office?

A The complement consisted of seven people and I was in charge of the seven, but I was directly responsible to the special attorney who was the chief clerk, and his name was Mr. Robert M. Jupiter.

Q But Mr. Jupiter was not physically located in the clerk's office?

A He had the office on the outside of this partitioned office.

Q Was there a practice in the office regarding the filing of documents?

A Yes, there was.

Q Let me show you Government's Exhibit 1, which is a second-offender information. Do you remember or recognize that document?

A No, I do not.

Q Did your office routinely file documents with the court clerk's office?

A Yes, it did.

Q Could you describe that procedure? If someone deposited a document with you to be filed, how was it filed with the clerk's office?

A All legal papers prepared by the assistants were processed by our office. That means that we checked for affidavits of mailing, and then when that was properly

filed out we hand delivered the document to the appropriate clerk of the court.

Q In the normal practice, how often would deliveries be made from your office to the court criminal clerk's office?

A I would say two to three times a day.

Q Could you characterize how many documents were taken on each occasion that a delivery was made?

A Depending on the volume of business, it would be three, six, seven, ten.

THE COURT: Items to be delivered to the clerk's office, the clerk of the court?

THE WITNESS: That's right, your Honor.

Q When the documents were brought to the criminal clerk's office, what was done with the documents? This is the court criminal clerk's office.

A I understand, sir. I would bring the documents to the criminal clerk's office, which at that time was located in room 340, criminal clerk, and that room was behind the judges' entrance room to courtroom 318.

Q When they were brought there, what would be done with them?

A I would deliver them to the clerk at the desk. If the clerk was away from his desk, I would put them in an

appropriate file box.

Q There was a box on the clerk's desk?

A On the clerk's desk or filing.

Q These deliveries were made at least twice a day?

A At least twice a day, yes, sir.

Q You have been in the office since 1960. Has there ever been an occasion in which a document was lost for a period of days or for some period of time before it was filed, to your knowledge?

A No.

Q In the entire period of time that you have been there, you do not recall any document being lost for any period of time over two days before it was filed?

A No.

Q Would such information be brought to your attention if a document had been lost?

A If such a predicament arose, I am sure we would be notified about it.

Q I have one further question: In the U. S. Attorney's criminal clerk's office, is the filing done in that office or is the filing done in another office? There are files routinely kept in the criminal clerk's office?

A No, they are not.

Q What is done with the case files?

A The case files are transferred to the file room.

Q Is it accurate to say that in the U. S. Attorney's criminal clerk's office there are not documents such as Exhibit 1, secon -offender information, lying around?

A No, sir.

MR. LAWLOR: No further questions.

THE COURT: You may inquire.

CROSS-EXAMINATION

BY MR. IANNUZZI:

Q In 1972, were you advised or did you advise any Assistant United States Attorney or the United States Attorney that in fact there was an error in the filing of a second-offender information and the date stamped on it?

A No, sir.

Q Is it your testimony that had such occurred in the clerk's office, you would have been the one who would have been advised?

A Yes, sir.

Q And when for the first time did any United States Attorney, any United States Attorney up to the present

minute talk to you about an alleged error in a date on a document that appears before you?

A Never.

Q Did any, Mr. Whitney North Seymour, Mr. Viviani or Mr. Rohrer, consult with you in May of 1972 concerning an alleged error in the filing of a document?

A No, sir.

Q I ask you to look at Exhibit 1 before you, it is directly in front of you. You are familiar with those documents, aren't you?

A Yes, I am, sir.

Q What is the date of the filing of that document?

A Filed April 21, 1972.

Q Is there any question in your mind that that is the date that that document was filed?

MR. LAWLOR: Objection, your Honor. She has no basis to know.

THE COURT: Do you have any personal knowledge?

THE WITNESS: No, sir.

Q In looking at the document and to the best of your knowledge, with the experience that you have both working for the court and working for the United States Attorney, what would it be in your opinion as a clerk with

seventeen years' experience, when was that document filed?

MR. IANNUZZI: I object, your Honor.

THE COURT: It is obvious she is going to answer from the date.

A Filed April 21, 1972.

THE COURT: What do you base that on? Is it the date that appears thereon?

THE WITNESS: The file stamp appears on the document.

Q Do you have any basis to indicate to this Court that that date is incorrect?

A No, sir.

MR. IANNUZZI: Thank you. No further questions.

THE COURT: You may step down.

Any other witnesses?

(Witness excused)

MR. LAWLOR: We have no further witnesses at this time.

THE COURT: Any rebuttal witnesses? Both sides rest?

MR. IANNUZZI: We have no further witnesses, your Honor.

THE COURT: Decision reserved.

(Time noted: 1 p.m.)

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Helen Kowalski	110	114		

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F,G	35	36
H,I		42
J	55	

HEARING EXHIBIT A

Hearing Exhibit A not reproduced at this point is reproduced at page A-33 as Motion Exhibit B

A 175 HEARING EXHIBIT C

CRIMINAL DOCKET
UNITED STATES DISTRICT

D. C. Form No. 100 Rev.

TITLE OF CASE

THE UN.

HARRY C

(2)

NER

72 CRIM. 311.

ATTORNEYS

For U. S.:

Jeffrey Harris, ext. 6293

For Defendant:

USA 33s - 475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

C - 1

TPI MI— 9-24-75-50M-4417

BEST COPY AVAILABLE

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed ✓	Clerk					
J.S. 3 mailed	Marshal					
Comp. #72-0399	Docket fee					
Title 18						
Sec. 656						
Employee embezzling funds of insured bank.						
fifteen counts						

DATE	PROCEEDINGS
3-17-72	Filed indictment.
3-27-72	Jay Gold, Esq., assigned as attorney under C.J.A. - Pleads not guilty. Released on own recognizance. Deft. ordered fingerprinted and photographed. Motions ret. in 10 days. POLLACK, J.
3-27-72	Filed- copy 5 of C.J.A form 20. Appointing Counsel. Jay Gold 233 B'way. NYC Mailed copy to ADm. off. Wash. D.C. Pollack, J.
4-27-72	Deft & atty. present. Withdraw plea of Not Guilty & enters plea of GUILTY to COUNT 1 only. Pre-sentence report ordered, June 8, 1972 for sentence, Counts 2 thru 15 open. Deft cont'd R.O.R. Motzner, J...
6-8-72	Filed Judgment (Atty. present) deft is sentenced on ct. 1 as a YOUNG ADULT OFFENDER pursuant to Ti. 18, U.S. Code, Sec. 5010(a) as extended by Ti. 18, U.S. Code, Sec. 4209. Imposition of sentence on ct. 1 is suspended. Deft is placed on probation for a period of THREE(3) YEARS, subject to the standing probation order of this Court. Cts. 2 through 15, incl., are dismissed on motion of deft's counsel with consent of the Government.....Motzner, J....

A 176

HEARING EXHIBIT D

JUDGE CANNELLA

USA 88s-475
(ED 4-2[illegible]-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

D - [illegible]

FPI MI—9-24-75-50M-4417

72 CRIM. 312

CASE	ATTORNEYS
STATES	*For U.S.:*
	George E wilson, ext. 6439
SANCHEZ	
	For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed ✓	Clerk					
J.S. 3 mailed ✓	Marshal					
~~XXXXXX~~Comp.#71-2353	Docket fee					
Title 18						
Sec. 656						
Employee embezzling funds of insured bank,						
two counts						

DATE	PROCEEDINGS
3-17-72	Filed Indictment.
4-17-72	Deft & atty present. PLEADS GUILTY to count 2 and NOT GUILTY to count 1. Bail cont'd $15,000. on 71 Cr.1126 P.S.I. ordered Sent.6-9-72....Cannella,J.
6-9-72	Filed Judgment(Atty.present)deft is committed to the custody of the Atty.Gen.or his representative pursuant to Sec.4208(b)of Ti.18,U.S.Code, for study, report and recommendations as described in Sec.4208(c). This commitment deemed to be for the maximum sentence prescribed by law, to wit: FIVE(5)YEARS, unless altered pursuant to said section upon receipt of report and recommendations. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within THREE(3)MONTHS.....Cannella,J. Issued commitment and copies.....
6-24-72	Filed Commitment & entered return, Deft. Delivered to the Fed. Detention N.Y. 6-8-72

DSLER

A 177

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT JUDGE GAGLIARDI

HEARING EXHIBIT E

72 CRIM. 315

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Walter J. Higgins, Jr, 6346
NICHOLAS CHRISTOPHE	
FRANK DeSIMONE	
VICTOR PANICA	
ALBERT PIERRO	For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed ✓	Clerk		6/21/72	P Greenberg	5 —	
J.S. 3 mailed 2/6/73	Marshal		6/23/72	N S Treas.		5 —
XXXXXXXXComp. #72-0335	Docket fee		6/21/72	J Goldberg	5 —	
			6/23/72	M S Treas.		5 —
Title 21			6/28/72	J M LaRossa	5 —	
			6/29/72	J M S Treas.		5 —
Sec. 812, 841(a)(1) 841(b)(1)(A)			1/2/73	Messenger	✓	
& 846. Possess with intent			1/23/73	Treas		5 —
to distribute heroin, I						
(ct. 2) conspiracy so to						
do (ct. 1)						
two counts						

DATE	PROCEEDINGS
3-17-72	Filed Indictment.
3-21-72	Nicholas Christophe) All defts enter pleas of not guilty.
	Frank De Simone) Bail as set in indictment 72 Cr. 138
	Victor Panica) on each deft. to cover this indictment
	Albert Pierro) previous motion carried to this end.
	Trial date 4-21-72 Gagliardi, J.
4-21-72	Victor Panica Filed- Second information of orfender.
4-21-72	Albert Pierro Filed- Second information of orfender.
XXXXXXXX

A 178

HEARING EXHIBIT F

WSH:jmrs
72-0335

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Cr. 313

APR 21 1972

S. D. OF N. Y.

UNITED STATES OF AMERICA

-v-

VICTOR PANICA,

Defendant.

INFORMATION

Section 851 of Title 21, U.S.C., relating to Indictment 72 Cr. 313 filed the 17th day of March, 19 72

I, WHITNEY NORTH SEYMOUR, JR. United States Attorney for the Southern District of New York, do accuse the defendant above-named who is also named in Indictment 72 Cr. 313 of having been previously convicted as herein below described.

The said defendant, on or about the 9th day of November, 1960, in the Southern District of New York was duly convicted of having received, concealed sold and facilitated the receipt, concealment and sale of a narcotic, to wit, heroin, in violation of Sections 173 and 174 of Title 21, United States Code, upon a verdict of guilty on Indictment Cr. 159-229.

APR 21 1972

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

(2)

COUNTY OF NEW YORK } SS

_____ being duly sworn,

deposes and says that he is employed in the office of _____

_____ United States Attorney for

the Southern District of New York, attorney for the _____

herein.

That on the _____ day of _____, 19___, he did serve a true copy of

the hereto annexed _____

_____

on the office of _____

attorney for the _____ herein, located at _____

_____

Borough of _____, City of New York, by leaving a true copy of the same with

the person in charge of said office, there being no one present who was authorized to give an admission

of service.

_____

Sworn to before me this

_____ day of _____, 19___

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF NEW YORK } SS

Stephanie Fortuyk being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Southern

District of New York.

That on the 17th day of April, 1972 he served a copy of the within

Information (Re Victor Rivera)

by placing the same in a properly franked envelope addressed to:

Vincent W. Lanna Esq.
50 Riverdale Ave.
Yonkers N.Y. 10701

And deponent further says that he sealed the said envelope and placed the same in the mail chute

drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of

New York.

Stephanie Fortuyk

Sworn to before me this

17th day of April, 1972

Notary Public

York

A 180

...take notice that a ...
...in is a copy, was this day
...e within entitled action, in
...Clerk of this Court.

..., 19...

...ours, etc.,

United States Attorney
Attorney for ...

Attorney for ...

...lice that the within ...
... for settlement and ...
...norable ...
...trict Judge, at the office of
...601, United States Court-
...se, Borough of Manhattan,
...on the ...day of ..., ...
...o'clock in the ... noon,
...ter as counsel can be heard.

..., 19...

...ours, etc.,

United States Attorney
Attorney for ...

Attorney for ...

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

VICTOR PANICA,

Defendant.

INFORMATION

Second Narcotics Offender -
T. 21 U.S.C. §§173, 174

WHITNEY NORTH SEYMOUR, JR.
TEL. 264-XXXX 6346 United States Attorney
Attorney for USA

Due service of a copy of the within is hereby admitted.

New York, ..., 19...

Attorney for

To

Attorney for

JUN 20 1972

HEARING EXHIBIT G

WJH,Jr:rs
72-0335

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 CR 313

UNITED STATES OF AMERICA	:	INFORMATION
-v-	:	Section 851 of Title 21, U.S.C.,
ALBERT PIERRO,	:	relating to Indictment 72 Cr. 313
Defendant.	:	filed the 17th day of March, 1972

I, WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, do accuse the defendant above-named who is also named in Indictment 72 Cr. 313 of having been previously convicted as herein below described.

The said defendant, on or about the 2nd day of October, 1953, in the Eastern District of Michigan, Southern Division was duly convicted of violations of Section 174 of Title 21 and Section 2553(a) of Title 26, United States Code for having unlawfully possessed and sold heroin, upon a plea of guilty to Indictment No. 32642.

U.S. DISTRICT COURT
FILED
APR 21 1972
S.D. OF N.Y.

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

3

_____ being duly sworn

deposes and says that he is employed in the office of _____

_____ United States Attorney for

the Southern District of New York, attorney for the _____

herein.

That on the _____ day of _____, 19 ____, he did serve a true copy of

the hereto annexed _____

_____

on the office of _____

attorney for the _____ herein, located at _____

_____

Borough of _____, City of New York, by leaving a true copy of the same with

the person in charge of said office, there being no one present who was authorized to give an admission

of service.

_____

Sworn to before me this

_____ day of _____, 19____

_____

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Stephanie POSTUPAK being duly sworn,

deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of April, 1972 she served a copy of the within

Information (Albert Tate)

by placing the same in a properly franked envelope addressed to:

Daniel H. Greenberg Esq.
340 Madison Ave.
New York N.Y.

And deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Stephanie Postupak

Sworn to before me this

17th day of April, 1972

Albert M. Cerasia

ALBERT M. CERASIA
Notary Public, State of New York
No. 41-0234650
Qualified in Queens County
Certificate Filed in New York County
Term Expires March 30, 1973

ON A PROTECTED TRIP - KINDLY TURN IN THIS CONDUCTOR EACH TIME

A 183

...take notice that a ...
...tin is a copy, was this day
...e within entitled action, in
...Clerk of this Court.

..., 19...

...ours, etc.,

United States Attorney
Attorney for ...

Attorney for ...

...tice that the within ...
...d for settlement and sig-
...norable ...
...strict Judge, at the office of
...601, United States Court-
...are, Borough of Manhattan,
..., on the ... day of ..., ...
...o'clock in the ... noon,
...fter as counsel can be heard.

..., 19...

Yours, etc.,

United States Attorney
Attorney for ...

Attorney for ...

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

ALBERT PIERRO,

Defendant.

INFORMATION

Second Narcotics Offender -
...174, T. 21 & ...2553(a), T. 26, U.S.C.

WHITNEY NORTH SEYMOUR, JR.

TEL. 264-2211 Ext. 6346 United States Attorney
Attorney for USA

Due service of a copy of the within is hereby admitted.

New York, ..., 19...

Attorney for

To

Attorney for

JUN 20 1972

[illegible] and 16th [illegible] [illegible]
the person named on the above
Offender Identification Record

BEST COPY AVAILABLE

72 CRIM 309

DATE	PROCEEDINGS
4-5-72	Filed- Govt's. bill of particulars.
4/10/72	LOUIS CIRILLO - Filed following papers received from U.S. Magistrate Docket sheet $250,000 post indictment, bond Stuyvesant Ins
4-18-72	Filed memo. endorsed by Judge Weilfeld, dated 4-17-72 on motion for individual voir dire. Motion denied. (see file) (n/m)
4-21-72	Filed- Order that the U.S. Marshal transport the Deft. to the offices of Dr. Arnold Berrett, for undergoing medical diagnostic procedures. Weinfeld, J.
4-21-72	Louis Cirello Filed- Second information of offender.
	Victor Panica Filed Second information of orfender. error
	Albert Pierro Filed Second information of orfender error
**4-4-72	Hearing held on deft's application to adjourn trial date-denied. Govt's application to increase bail, adj'd to 4-5-72. WEINFELD,J.
4-5-72	Motion to increase bail-denied. WEINFELD,J.
4-17-72	Jury trial begun before WEINFELD,J.
4-18-72	Trial cont'd.
4-19-72	Trial cont'd.
4-20-72	Trial cont'd.

Hearing Exhibit H, Enlarged Portion of 72 Cr. 309 Docket Sheet
A-184

HEARING EXHIBIT 1

Hearing Exhibit 1 not reproduced at this point is reproduced as Motion Exhibit B at page A-33

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 186

72 CR 309

HEARING EXHIBIT 3

---x

UNITED STATES OF AMERICA,

-against-

LOUIS CIRILLO,

Defendant.

---x

DEFENDANT'S SUPPLEMENTAL REQUESTS TO CHARGE

USA 33s - 475
(ED. 4-23-71)

GOVT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

3

ALBE
ATT
4
New

WA 5-5937

DECISION BELOW

A 187

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

-against- : 72 Cr. 309

LOUIS CINILLO, :

OPINION

Defendant. :

- x

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York

Attorney for the United States of America

RICHARD F. LAWLER, ESQ.
Assistant United States Attorney
Of Counsel

IANNUZZI & IANNUZZI, ESQS.
233 Broadway
New York, New York

Attorneys for Defendant

JOHN NICHOLAS IANNUZZI, ESQ.
Of Counsel

EDWARD WEINFELD, D. J.

On May 25, 1972, following his conviction after a jury trial of one count of distribution of heroin and one count of conspiracy to import and distribute heroin, in violation of 21 U.S.C., sections 812, 841(a)(1), 841(b)(1)(A), 846, and 963, the defendant was sentenced to two concurrent terms of twenty-five years imprisonment, followed by a special parole term of ten years. By virtue of his previous conviction of violations of the provisions of Title 21, United States Code, the defendant's sentence was enhanced pursuant to 21 U.S.C., section 841(b)(1)(A). Almost four years after imposition of sentence, defendant now moves to vacate this sentence as illegal, claiming that the second offender information was not filed with the court prior to the date his trial began, as required by 21 U.S.C., section 851(a)(1).[1] After hearing argument on the motion, the court, upon request of defendant's counsel, set the matter down for a hearing and testimony of witnesses was taken.

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(1) See United States v. Noland, 495 F.2d 529 (5th Cir.), cert. denied, 419 U.S. 966 (1974); but see, e.g., United States v. Dubart, 269 F.2d 113, 115-16 (2d Cir. 1959) (under former 26 U.S.C. § 7237(c)(2), the predecessor to 21 U.S.C. § 851). Under the circumstances, the court does not address whether the Noland case, however much the ruling in another circuit is entitled to respect, should be followed.

The defendant has failed to sustain his claim that the second offender information was filed subsequent to the commencement of trial. To the contrary, the claim is negated by substantial evidence of contemporaneous events. Dean C. Pohrer, then an Assistant United States Attorney, swore to an affidavit of mailing of the second offender information to defendant's attorney on April 10, 1972, and both he and the other Assistant United States Attorney who prosecuted defendant stated that it was their regular practice to file papers with the court at or about the time they were mailed.(2) At the time of sentence the United States Attorney stated on the record that there was a clerical error in the docket sheet and moved for correction to reflect the proper date that the information was filed, to wit, April 12, 1972. Defendant's counsel, acknowledging that he had received "a copy some time ago," made no objection; accordingly, the record was corrected nunc pro tunc. Defendant's trial counsel was of exceptional experience and ability in criminal law matters and clearly would not have consented to the correction had the facts been otherwise. Indeed the failure to obtain an affidavit from him or to offer his testimony upon the hearing, or to explain the failure to

(2) See Rule 406, Fed. R. Evid.

produce his testimony, is of great significance.[3]

Principal reliance by defendant's counsel is placed upon a date stamp on the face of the information bearing the legend April 21, 1972 and upon a docket entry for its filing bearing the same date. Based thereon the defendant's counsel charges that the United States Attorney was "aware that . . . timely filing had not taken place . . . and that [he] purposely and intentionally mis-advised this Court that the said filing had been timely made." The United States Attorney testified to the circumstances under which he applied for and obtained correction of the error. In order to accept the theory propounded by defendant, the court would have to believe either that the United States Attorney deliberately and knowingly lied to the court at the time of sentencing or that one or more of his assistants deliberately and knowingly lied to the United States Attorney. Defendant has not produced evidence to warrant this conclusion. The evidence is decidedly to the contrary. The charge is unjustified. To the court's own knowledge errors and delays in the filing of documents in the Clerk's

(3) See United States ex rel. Brooks v. McMann, 408 F.2d 823, 826 (2d Cir. 1969); United States ex rel. Pomchak v. New York, 323 F.2d 449, 450 (2d Cir. 1963), cert. denied, 376 U.S. 919 (1964); United States ex rel. Irving v. Henderson, 371 F. Supp. 1266, 1276 (S.D.N.Y. 1974).

officers are, unfortunately, by no means uncommon.

The motion is denied.

Dated: New York, N. Y.
January 10, 1977

United States District Judge

Rec'd USDC-SDNY
Clerk's Office 3:30PM
11/20/77 J.P.F.
Order Section

A-192

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Appellee,

-against-

LOUIS CIRILLO,

Defendant-Appellant.
----------x

72 CR 309

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the defendant hereby appeals to the United States Court of Appeals for the Second Circuit from an order of the United States District Court for the Southern District of New York (Weinfeld, J.), entered the 19th day of January, 1977, denying a motion to vacate a sentence illegally imposed, and from each and every part thereof.

Yours, etc.,

IANNUZZI & IANNUZZI
Attorneys for Defendant-Appellant
233 Broadway
New York, N.Y. 10007
BArclay 7-9595

TO: Clerk, U.S. District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN., N.Y.